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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.,
*Appellees,*

v.

UNITED STATES OF AMERICA ET AL. (Pittsburgh Towing Company), *Appellant*

**On Appeal From the United States District Court for the Eastern District of Missouri—Eastern Division**

## JURISDICTIONAL STATEMENT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 2 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement of case | 4-6 |
| The questions are substantial | 6-7 |
| Conclusion | 7 |

Appendix A,
Opinion of the court below ..... 1a

Appendix B,
Report and order of I.C.C. ..... 12a


### Table of Cases Cited


Abco Moving & Storage Co. Inc.—Purchase—Dierking, 47 M.C.C. 557, also 52 M.C.C. 131 ..... 29a, 40a

Ace Lines, Inc., Revocation of Certificates, 76 M.C.C. 667 ..... 34a

Atwood's Transport Line—Lease, 52 M.C.C. 97 (1950) 23a

Brooks Transportation Co. et al., U.S, decided May 13, 1957, U.S. District Court for Eastern District of Virginia ..... 22a

Columbia Broadcasting System v. U. S., 316 U.S. 407, 417, 422 (1942) ..... 7a

Communication Comm'n v. WOKO, 329 U.S. 223 .... 37a

County of Marin v. U. S., 356-412 (1958) ..... 23a, 27a

Gay v. United States, Civil Action No. 5885, U.S.D.C. for Western District of Oklahoma ..... 25a

McKay v. Wahlenmaier, 226 F. 2d 35, 43 ..... 7a

Pan-Atlantic S.S. Corp.—Purchase—Agwiliner, 85 M.C.C. 485, 489 ..... 25a

Performance of Service by Riss & Co., 48 M.C.C. 327, 49 M.C.C. 111 ..... 35a

Page

Pittsburgh Towing Co., Certificate Transfer—Charles Zubik,—F.D. 21193 D.C. 1 ..... 1a
Pittsburgh Towing Co. v. Union Barge Line et al., I.C.C. Docket 155 — Civil Action 63-208 — U. S. District Court, Western Pennsylvania ..... 17a
State Corp. Commission of Kansas v. U. S. A., 184 F. Supp. 691, 696 ..... 2a
Stearn v. U. S., 87 F. Supp. 596, 601 (1949) ..... 21a, 23a
Towing Rates—Ohio River, 315 I.C.C. 315, 583 ..... 17a
Towing Rates—Pittsburgh Towing Co., 321 I.C.C. 366 ..... 17a, 34a
Universal Carrier Corp. v. NLRB, 340 U.S. 474 ..... 2a
U. S. v. Rester, 313 U.S. 57 (1941) ..... 23a
U. S. Lines Co. Certificate Transfer, 260 I.C.C. 355, 358 7a
United States v. Seatrain Lines, Inc., 329 U.S. 424 (1947) ..... 26a
Vinson v. Washington Gas Light Co., 321 U.S. 489 ... 22a
Virginia Stage Lines v. U. S., 48 F. Supp. 79 (1942) .. 23a
Wooton—Purchase Columbia Truck Express, 49 M.C.C. 586 (1949) ..... 24a
Yourga v. U. S. A., 191 F. Supp. 373 375, 376 ..... 2a

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MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.,
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v.

UNITED STATES OF AMERICA ET AL. (Pittsburgh Towing Company), *Appellant*

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**On Appeal From the United States District Court for the Eastern District of Missouri—Eastern Division**

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinion of the district court is reported at 252 F. Supp. 162 (Appendix "A"). The report of the Interstate Commerce Commission is reported at 324 I.C.C. 460 (Appendix "B").

## JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398 and 2321-2325 to vacate, set aside, and annul an order of the Interstate Commerce Commission. The Order of the three-judge district court was entered on March 25, 1966 (p. 10a). Appellants filed notice of appeal in the district court on April 15, 1966. The jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b).

## THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL

1. Whether the Court erred in its finding, judgment and decree that the determination of Defendant Interstate Commerce Commission in Docket No. 21193 was not supported by substantial evidence or was induced by misapplication of the law.

2. Whether the Court erred in its finding, judgment and decree that the appellant, Intervenor Pittsburgh Towing Company, failed to meet the requirements of Defendant Interstate Commerce Commission regulations set forth in 49 C.F.R. 306.1 through 306.10 and part 3 of the Interstate Commerce Act, 49 U.S.C. Section 901 et seq.

3. Whether the Court erred in its finding, judgment and decree that proceedings for transfer of Water Carrier Certificate W-364 were for the purpose of circumventing regulations of Defendant Interstate Commerce Commission.

4. Whether the Court erred in its finding, judgment and decree that Defendant Interstate Commerce Commission violated and ignored its own rules in the ap-

plication and proceedings for transfer of Water Carrier Certificate W-364.

5. Whether the Court erred in failing to remand this cause to the Interstate Commerce Commission for further proceedings.

## STATUTES AND REGULATIONS INVOLVED

Section 312 of the Interstate Commerce Act, 49 U.S.C. § 912, provides for the transfer of previously-issued water carrier certificates:

> Section 312. Except as provided in this part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

Pursuant to the above statutory authority, the Commission has prescribed detailed regulations governing the transfer of water carrier certificates. These regulations are published at 49 C.F.R. 306.

The regulation pertinent to the instant case is quoted in the opinion, Appendix "A".

At the time the decision of the Commission was issued, the Commission had no statutory authority to revoke a water carrier certificate under any circumstances. Subsequently, on September 6, 1965, Congress enacted Section 312a of the Interstate Commerce Act, 49 U.S.C. § 912a, which provides:

> "Sec. 312a. (1) Certificates and permits shall be effective from the date specified therein, and shall remain in effect until suspended or revoked as provided in this section.

"(2) Any certificate or permit issued under this part may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may, upon complaint, or on the Commission's own initiative, after reasonable notice and opportunity for hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with the provisions of section 305(a) with respect to performing, providing, and furnishing transportation upon reasonable request therefor: *Provided, however,* That no such certificate or permit shall be suspended, changed, or revoked under this paragraph (except upon application of the holder) unless the holder thereof, fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304 (e) of this title, commanding obedience to the provisions of section 305(a) with respect to performing, providing, and furnishing transportation upon reasonable request therefor."

## STATEMENT OF CASE

On July 8, 1960 an application was filed with the Commission for transfer of a water carrier certificate, W364, then held by Charles Zubik to the Pittsburgh Towing Company. The application, Docket F 21193, was in the form specified by the Commission's regulations (49 C.F.R. 306.3), and notice of the filing of the application was sent by letter to all known competitors of the transferor, including the plaintiffs in this court proceeding, and the Governors of the adjacent states.

No protests to the application were timely filed, and on September 9, 1960, Division 4 of the Commission approved the transfer, subject to the transferee's filing,

within 20 days after consummation, a copy of the instrument by which the operating rights were conveyed and an opinion of counsel as to the fact of legal consummation. On November 17, 1960, such notice and opinion were filed with the Commission, and sometime that month Pittsburgh Towing Company commenced operations.

On October 24, 1960, the plaintiffs filed with the Commission a petition for leave to intervene and to file a petition for rehearing and reconsideration. That petition was denied on December 30, 1960.

On January 4, 1961, *after* the transfer had been consummated, plaintiffs filed an amendment to their prior petition for leave to intervene, etc., alleging that Zubik had misrepresented to them the nature of the transfer. This was followed on February 8, 1961, by a new petition for reconsideration. The Commission, in an order served October 10, 1961, concluded:

> That, upon consideration of the petition for reconsideration filed February 8, 1961, and the reply thereto, there has been presented sufficient justification to warrant reconsideration of the order of the Commission, Commissioner Tuggle, dated December 30, 1960:

The order of the Commission further provided:

> That the proceeding be, and it is hereby reopened for further consideration and assigned for hearing * * *.

Following a full (four day) hearing before a Commission examiner in which the Commission's own Bureau of Inquiry and Compliance was directed to appear, and after the submission of briefs, the examiner

issued his recommended report and order, recommending that the transfer be disapproved and set aside. On exceptions, however, Division 3 of the Commission, with Commissioner Murphy dissenting, disagreed with the examiner and concluded that its prior approval of the transfer should be affirmed. Petitions for reconsideration were denied on January 3, 1964, by Division 3, Acting as an Appellate Division.

On January 7, 1964, plaintiffs filed a complaint in this proceeding, seeking to have the order of Division 3 annulled and set aside. Subsequent thereto the Commission, Division 3, on its own motion reopened the proceeding for reconsideration, and withheld issuance of the certificate to transferee pending reconsideration. Because of the policy matters involved, the proceeding was recalled from the Division by the entire Commission.

The new report and order of the entire Commission, with four Commissioners dissenting, was issued on March 19, 1965. The entire Commission, after full consideration of the record and the policy questions involved, concluded that its prior approval of the transfer should not be set aside.

Plaintiff's amended complaint was filed in this proceeding on or about June 14, 1965.

## THE QUESTIONS ARE SUBSTANTIAL

Preservation of the policies of Congress in giving to the Commission such broad and exclusive powers in transfer cases, is vital to the public interest. When this statutory District Court granted a permanent injunction against the transfer of the Certificate W 364 to this appellant without remanding the case to the Com-

mission, the Court usurped the powers of the Commission.

District Courts may not lawfully exercise the powers given, exclusively, to the Commission. The Commission could have ordered a further hearing to correct any errors.

The memorandum opinion of the Court below, filed February 18, 1966, is quite broad in scope, but the judgment and decree filed March 25, 1966, from which this appeal is taken, does not follow the opinion and is predicated upon one single error. This single error is completely within the discretion of the Commission.

## CONCLUSION

For the reasons stated and the questions presented by this appeal which are substantial and are of public importance, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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## APPENDIX "A."

Filed Feb. 18, 1966

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 64C 3 (1)

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., and UNION BARGE LINE CORPORATION, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

Before MATTHES, Circuit Judge, HARPER and MEREDITH, District Judges.

HARPER, District Judge.

### Memorandum Opinion

This action was brought under 28 USCA 1336 and 2284 on January 7, 1964, by the plaintiffs to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission (hereinafter referred to as the Commission), dated April 9, 1963, and December 19, 1963, and served April 24, 1963, and January 3, 1964, respectively, in Finance Docket 21193, *Pittsburgh Towing Company, Certificate Transfer—Charles Zubik,* which authorized transfer and issuance of Certificate W-364 to the Pittsburgh Towing Company.

Pursuant to 28 USCA 2321-2325, a three-judge court was constituted. On February 18, 1964, on its own motion, the Commission re-opened the hearing before it and this court stayed proceedings pending disposition of the matter by the Commission. In its decision dated March 19, 1965, the Commission, with four commissioners dissenting, approved

the transfer, but stayed the effect of its order until the termination of the proceedings before this court and the meeting of certain conditions by Pittsburgh.

Thereafter, on June 10, 1965, the plaintiffs filed an amended petition seeking to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963, and March 19, 1965, in said matter. On October 28, 1965, the court held its hearing in this matter.

Under 5 USCA 1009(e) the scope of our review of the Commission's orders is limited to a determination upon the whole record of whether the Commission's findings are supported by substantial evidence or whether its findings and conclusions are induced by misapplication of the law. If the Commission's findings are supported by substantial evidence and are in accordance with the law, they must be upheld. *Yourga* v. *USA,* 191 F. Supp. 373, 375, 376; *Universal Carrier Corporation* v. *NLRB,* 340 U.S. 474; *State Corp. Commission of Kansas* v. *USA,* 184 F. Supp. 691, 696.

Plaintiffs attack the orders of the Interstate Commerce Commission on the grounds that the orders are contrary to law and the Commission's transfer regulations, are based upon misrepresentations, are not supported by the facts essential to determine whether the transaction was lawful, and the failure to disclose essential facts in the application for transfer filed with the Commission on July 8, 1960.

This proceeding arose from an application filed on July 8, 1960, by Charles Zubik to approve the transfer of Certificate W-364 from himself to Pittsburgh. On September 9, 1960, the transfer was approved by order of the Commission based solely upon the application. Thereafter, plaintiffs filed a petition on October 24, 1960, for leave to intervene and for re-opening and vacation of the order of September 9, 1960, which petition was denied by the Commission on December 30, 1960, but on September 13, 1961, upon consideration of an additional petition by the plaintiffs, the

Commission re-opened the proceedings for further consideration and hearing, and stayed issuance of the certificate to transfer pending final disposition of the matter.

The plaintiffs were permitted to intervene, but the order of September 9, 1960, was not vacated. A hearing, in which the Bureau of Inquiry and Compliance participated, was held. The hearing examiner recommended that the order approving the transfer be set aside and the application be denied, but the Commission on April 9, 1963, affirmed the order approving the transfer.

The plaintiffs filed a petition for reconsideration, which was denied by the Commission on December 19, 1963, and on January 7, 1964, the suit in question was filed.

A brief statement of the facts concerning other matters disclosed by the record is pertinent at this point. Water Carrier Certificate W-364 was issued to Charles Zubik on January 18, 1943. Services under the certificate were suspended on or about July 31, 1950. During that year the certificate holder was relieved of the duty of filing annual reports until such time as operations were resumed. On November 3, 1959, the Pittsburgh Towing Company was incorporated in the Commonwealth of Pennsylvania for the purpose of conducting towing operations on inland waterways.

Edmond D. Osbourne was responsible for the incorporation of Pittsburgh and at the time of incorporation was one of the incorporators. Two hundred one shares of stock were issued at the time of incorporation, one hundred shares to Osbourne, one hundred shares to Douglas B. Myers, and one share to a Francis X. Wiget. On June 9, 1960, an option agreement was entered into between Charles Zubik and Edmond D. Osbourne, wherein for a consideration of $50.00 Zubik gave to Osbourne the exclusive right of option to purchase at any time prior to December 31, 1960, for a purchase price of $100,000.00 the water carrier certificate involved in this matter, provided the transfer was approved

by the Commission. The option agreement further provided that if Osbourne gave notice in writing to Zubik prior to December 31, 1960, of his election to exercise the option, Zubik would apply to the Interstate Commerce Commission for approval of the proposed transfer and assignment of the said water carrier certificate to Osbourne or his designee, utilizing such counsel as Osbourne might approve in seeking such transfer.

On June 29, 1960, Zubik, at Osbourne's request, amended the option agreement and assigned the Water Carrier Certificate W-364 to Pittsburgh, subject to approval by the Commission, with the understanding that upon the Commission's approval of the transfer Pittsburgh would issue to Zubik twenty-five hundred shares of its capital stock. This change in the agreement was made in an effort to facilitate the transfer of the certificate. Osbourne had until December 31, 1960, to exercise his option to purchase the twenty-five hundred shares from Zubik in exchange for the one hundred thousand dollars agreed upon in the option agreement of June 9th. As will be pointed out later, the reason for the injection of the corporate device in the manner in which it was done was a mere subterfuge to circumvent Commission regulations pertaining to transfer.

On July 8, 1960, when the application for the transfer was filed by Zubik, Paragraph 2(n) of the application stated that the transferee would be officered by Zubik, Osbourne and other persons. The record shows that Zubik at no time, neither before nor after transfer, was an officer of the corporation. Paragraph 2(o) of the application states: "Transferee is a new corporation which has been organized for the purpose of acquiring and operating the Certificate W-364 * * * ."

The record discloses that the corporation was organized in November of 1959, the agreement with respect to Osbourne acquiring the certificate was entered into on June 9, 1960, and that the corporation did not enter the picture

until June 29, 1960. The record further discloses that on June 8, 1960, the two hundred one shares of stock which at that time had been issued in the corporation were all owned by Osbourne, and that Zubik did not own any of said stock until September 19, 1960. The record further discloses that Zubik owned some eight towboats and four barges at the time of the application and that Pittsburgh owned no towboats, no barges, and had little, if any, capital.

On July 7, 1960, Zubik sent notices to all his supposed competitors, which notice read as follows: "This is to notify you that for personal reasons I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation, of which *I am* the owner, Pittsburgh Towing Company."

This statement to the effect that he (Zubik) was the owner of this corporation is completely refuted by the record, which shows that on that date Osbourne was the sole owner of the corporation. When the Commission on September 9, 1960, approved the transfer of the certificate it had not seen and was not aware of the option agreement of June 9, 1960, the amendment to the option agreement of June 29, 1960, the contents of the articles of incorporation showing the incorporators of Pittsburgh, nor the true facts with respect to the ownership of the Pittsburgh stock at said time. The Commission did not see the agreements between Zubik and Osbourne for the sale of this certificate until during the hearing held in this matter on March 27 and 28, 1962, when the Bureau of Inquiry and Compliance participated. Those documents were produced at that hearing by the parties, reluctantly, and over strenuous objection.

Transfer of water carrier certificates is provided for in 49 USCA 912, which reads in part: "* * * any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this chapter."

Pursuant to said section the Commission has promulgated regulations 49 CFR 306.1 through 306.10 pertaining to the transfer of water carrier certificates. 49 CFR 306.9, one of the said regulations, provides:

> "The transfer of any certificate or permit under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest."

The only offer that Zubik has ever made concerning circumstances causing the suspension of operations was the bare assertion in the application that the suspension was caused by "circumstances over which your petitioner had no control • • •." There was a complete void of any showing that the resumption of operations under the certificate would be in the public interest. Nevertheless, on September 9, 1960, the Commission granted its initial approval of the transfer "for good cause appearing therefor."

As was mentioned above, hearings on the application were twice re-opened, and the option agreements were disclosed. It was during these hearings that the questions concerning the cause of the suspension of the operations and Pittsburgh's fitness to maintain operations were raised. The Commission took official notice of the fact that business conditions were unfavorable for water carriers during the 1950's. This notice completely ignores a fact well taken by the dissenting members of the Commission that Zubik's competitors underwent the same unfavorable conditions during the 1950's, and are today operating profitably with no interruption of service during the difficult years.

The Commission's regulations provide that a required exhibit to be submitted with the application for transfer

is "a copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer * * *." 49 CFR 306.4(b).

Nothing could fit this description more clearly than the option agreements entered into between Zubik and Osbourne. It is the option agreements which contain the evidence showing the actual purpose for the transfer of the certificate to Pittsburgh. No reasonable reader of the record before the Commission and this court could come to any conclusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission. The use of the corporate device and the transfer of the certificate to Pittsburgh was an attempt on the part of Zubik and Osbourne to transfer ownership of the certificate without subjecting themselves to the procedure specifically created for examining applications for transfer of ownership. Yet the Commission glossed over the fact that the option agreements were missing and not timely brought to its attention by stating that these agreements were not vital to the transfer.

Subsequent hearings resulted in a decision by a hearing examiner against the transfer and the Commission refusing to accept the findings and decision of the examiner.

This court cannot accept the Commission's refusal to heed its own regulations and the clear evidence of the attempt to deceive the Commission. Legislative regulations, created by a Federal agency pursuant to congressional authority, have the force of law. *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407, 417-419 (1942). The agency which promulgates the rule is as bound by its terms as is the general public. *Columbia Broadcasting System* v. *U. S.*, 316 U.S., 422; *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43. The Commission has itself held that it is bound by its rules. *United States Lines Co., Certificate Transfer,*

260 ICC 355, 358. Therefore, any action taken by the Commission is invalid unless the rules pertaining to the action are followed.

Besides the above-mentioned regulations concerning documents pertaining to the proposed transfer (49 CFR 306.4(b)), and a showing that the suspension of operations was caused by circumstances over which the certificate holder had no control (49 CFR 306.9), the applicant is required to submit "any additional information to show that the proposed transferee is fit, willing, and able *properly* to perform services authorized by the certificate or permit sought to be transferred." 49 CFR 306.3(o). (Emphasis added.)

There was a total absence of information in the application for transfer showing that Pittsburgh was in any way financially fit to carry on the operations authorized by the certificate. Nothing more than the intention of the supposed owner of all of the stock of Pittsburgh to make some arrangement appears in the application. Zubik stated that he was to be the holder of all of the issued and outstanding stock, when in truth he was not and never intended to be. Pittsburgh was Osbourne's corporation. The only connection with Pittsburgh that Zubik contemplated was a brief sojourn as stockholder while Osbourne purchased Zubik's stock, which he received in exchange for the certificate.

The Commission's reference to Pittsburgh's improving financial status is totally immaterial. So also is Zubik's temporary ownership of Pittsburgh stock after approval of the application. The Commission was required to view the parties at the time of the transfer application. Zubik concealed the options from the Commission as long as he could. The options changed the entire nature of the proceedings from a change in the *form* of ownership to a change in ownership. Totally different procedures and attitudes govern when change in the ownership of the

certificate is attempted. Zubik and Osbourne attempted to circumvent the regulations controlling the transfer of ownership of a certificate. Information was concealed from the Commission. The plan clearly was to transfer the certificate from Zubik, a sole proprietorship, to a corporation owned by Osbourne when the application was filed, and to be owned by Osbourne when the transfer was consummated.

The contention of Zubik, Osbourne and the Commission that this matter involves merely a change in the *form* of ownership completely ignores the option agreement with its obvious intentions. Deceit was perpetrated by Zubik in his letter to his competitors in July of 1960. The Commission allowed a concealment and violation of its rules in the application for transfer of the certificate on July 8, 1960. The Commission cannot ignore its own rules under the facts before it.

In view of the regulations and the record, the orders of the Commission approving the transfer of Water Carrier Certificate W-364 are hereby set aside and annulled.

A decree in accordance with this opinion may be submitted by the plaintiffs on notice unless consultation among the parties shall bring about a waiver of notice.

/s/ M. C. MATTHES
*U. S. Circuit Judge*

/s/ ROY W. HARPER
*U. S. Circuit Judge*

/s/ JAMES H. MEREDITH
*U. S. Circuit Judge*

## APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action 64 C 3(1)

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., and UNION BARGE LINE CORPORATION, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

### Judgment and Decree of the Court

This cause came on for final hearing on the Complaint herein praying for a judgment to enjoin, set aside, annul and suspend Orders of the Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 thereby restraining the transfer of Certificate No. W-364 to Pittsburgh Towing Company.

Pursuant to Sections 2321-2325 of Title 28 of the United States Code a three-judge court consisting of the Honorable M. C. Matthes, Judge of the United States Court of Appeals for the 8th Circuit, and the Honorable Roy W. Harper and Honorable James H. Meredith, Judges of the United States District Court for the Eastern Judicial District of Missouri, Eastern Division was designated. The issues having been duly heard by and evidence having been heard before said Court, upon consideration duly been given to all the issues before said Court and a decision thereon having been duly rendered, and upon the finding by this Court that Pittsburgh Towing Company had failed to meet the requirements of the Defendant Interstate Commerce

Commission's regulations set forth in 49 C.F.R., 306.1 through 306.10 and Part 3 of the Interstate Commerce Act, 49 U.S.C. Section 901 et seq,

IT IS ORDERED, ADJUDGED AND DECREED:

1) That the Orders of the Defendant Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 are hereby set aside, annulled and suspended.

2) That the Defendant Interstate Commerce Commission is permanently enjoined from transferring water carrier certificate No. W-364 to Intervenor Pittsburgh Towing Company, as authorized by said orders.

M. C. MATTHES
*United States Circuit Judge*

ROY W. HARPER
*United States District Judge*

JAMES H. MEREDITH
*United States District Judge*

**APPENDIX "B."**

ICC

Service Date April 16, 1965

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Finance Docket No. 21193

PITTSBURGH TOWING COMPANY—CERTIFICATE TRANSFER—
CHARLES ZUBIK

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Decided March 19, 1965

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1. Upon reconsideration, findings in the prior report, 317 I.C.C. 661, amplified and affirmed. Provision made for issuance of a certificate to the transferee superseding the certificate transferred. Conditions prescribed.
2. Petition of transferee to vacate and set aside the order reopening the proceeding for reconsideration, denied.

Appearances as shown in the prior report.

**Report of the Commission on Reconsideration**

WALRATH, *Commissioner:*

Issuance of a water carrier certificate of public convenience and necessity to the transferee superseding the certificate transferred in this proceeding was temporarily enjoined by the United States District Court for the Eastern District of Missouri, Eastern Division, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Company* v. *United States.* Subsequently, on its own motion, on February 18, 1964, Division 3, acting as an Appellate

Division, reopened the proceeding, which was recalled by the Commission at the request of the Division because of the policy matters involved regarding the transfer of water carrier certificates. On March 10, 1964, transferee filed a petition to vacate and set aside the order of February 18, 1964, to which interveners[1] replied. A stipulation has been lodged with the court that, if we affirm approval of the transfer, the proceeding will be stayed until the further order of the court, and the temporary injunction has been dissolved. In view of the stipulation and our conclusions, transferee's petition will be denied.

This proceeding arose from an application filed July 8, 1960, jointly by Charles Zubik, for himself, transferor, and Charles D. Osbourne, managing director, for Pittsburgh Towing Company, transferee, both of Pittsburgh, Pa., for approval under section 312 of the Interstate Commerce Act and the regulations thereunder,[2] hereinafter called the transfer regulations, of the transfer of the certificate dated January 18, 1943, issued to the transferor in No. W-364.

The certificate in question authorizes operation as a common carrier by towing vessels, in interstate or foreign commerce, in the performance of general towage between ports and points on the Ohio, Youghiogheny, Allegheny, Monongahela, and Kanawha Rivers.

The transferor had suspended operations subject to the act after World War II, although his towboats had been operating around Pittsburgh. He had been relieved in 1950

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[1] American Commercial Barge Line Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation.

[2] Rules and Regulations Governing Transfers of Certificates and Permits to Operate as a Water Carrier in Interstate or Foreign Commerce, contained in the Commission's order of August 4, 1943 (49 CFR, Part 306), section 306.4(f) of which was added by order of May 3, 1950, now superseded by order of October 31, 1963, which deleted said section and amended section 306.6(b) and (c).

from filing reports until such time as operations subject to the act were resumed. The transferee was a new corporation organized for the purpose of acquiring the certificate and operating thereunder. The transaction did not require approval and authorization under section 5(2) of the act. No representations in the proceeding had been made by State authorities. Competing water carriers had been notified, and no objection to granting the application had been presented. No hearing was deemed necessary.

The transfer was approved by order of the Commission, Division 4, dated September 9, 1960. Consummation was effected on November 17, 1960, and evidence of the transfer was filed, as provided in the order. Section 306.6(e) of the transfer regulations provides that, upon receipt of such evidence, an appropriate certificate superseding the certificate transferred will be issued.

After the prescribed period for filing petitions had expired and the order of September 9, 1960, had become effective, competing water carriers named in footnote 1 were stirred to action by transferee's publication of towing rates lower than theirs, to become effective upon consummation. They filed a petition, dated October 24, 1960, for leave to intervene and for reopening and vacation of the order of September 9, 1960. The petition was denied by order of the Commission, Commissioner Tuggle, dated December 30, 1960, but, by order dated September 13, 1961, upon consideration of additional petitions by the same carriers, and reply by transferee, Division 3 reopened the proceeding for further consideration and hearing, and stayed issuance of the certificate to transferee pending final disposition of the matter. Petitioners were permitted to intervene, but the order of September 9, 1960, was not vacated. A hearing, in which the Bureau of Inquiry and Compliance participated, was held. The hearing examiner recommended that the order approving the transfer be set aside and that the application be denied.

In the report, 317 I.C.C. 661, decided April 9, 1963, herein called the prior report, after hearing and further consideration, a majority of Division 3 affirmed the order by Division 4 approving the transfer. A petition of interveners for reconsideration was denied by an order of Division 3, acting as an Appellate Division, entered December 19, 1963. On or about January 8, 1964, one of the interveners filed the above-mentioned suit to enjoin, set aside, annul and suspend the orders of April 9, 1963, and December 19, 1963.

Interveners claim that errors were committed (1) by Division 4, prior to hearing, in finding transferee fit, willing, and able properly to perform the service authorized by the certificate, based on information and evidence submitted with the application; and in taking official notice that transferor's suspension of operations was due to circumstances beyond his control; (2) by Division 3, upon hearing and further consideration, in failing to consider the application *de novo,* wholly disregarding the prior approval and consummation and equities arising therefrom; in concluding that approval was not induced by misrepresentation of the nature of the transaction or of transferee's financial resources; in concluding, apropos of transferee's fitness, that its method of operation had not been shown to be unlawful (though this was not an appropriate proceeding in which to determine the question); and (3) by both Divisions, in failing to require a showing that reactivation of the long-suspended operations by transferee would meet a public need not otherwise being adequately met.

The pertinent facts are set forth in some detail in the examiner's report and in the prior report, and will be restated here only to the extent necessary for clarity of discussion.

Evidence submitted with the application included an assignment by Zubik, dated June 29, 1960, of the certificate in question to transferee, subject to approval by the Commission of the transfer. Information furnished was to the effect that transferee was organized November 4, 1959, with an authorized capital stock of 5,000 shares; that 2,500 shares would be issued to Zubik as compensation for the certificate; and that all or part of the remaining 2,500 shares would be sold and proceeds therefrom used to obtain necessary towing power units and other equipment. The stock had not been issued, officers had not been elected, and transferee would not be a carrier until the transfer of the certificate was approved. Officers and directors would not have any interest, control, or affiliation with any other common carrier subject to the jurisdiction of the Commission. Formal resolutions of stockholders or directors had not been adopted since Zubik would be the holder of all of the stock issued and outstanding on the date of consummation. It was stated that transferee would have as officers Zubik, Osbourne (who holds a master's certificate), and other persons experienced in the profession of river navigation. Zubik owned 8 towboats and 4 barges. Transferee proposed to acquire modern towing power units, but it was not known, with certainty, at that time from whom the units would be acquired. As the cause of suspension of transferor's operations, economic conditions were mentioned, and applicants asked that the rights be transferred and placed upon an active operating basis, and that the previously mentioned relief from filing reports be vacated.

At the bottom of the controversy in this proceeding is Zubik's notice to competitors, dated July 7, 1960. The controversy has caused the cross-filing of more than 30

pleadings by interveners and applicants, two rate proceedings,[3] two antitrust proceedings,[4] and the afore-

Section 306.4(f) of the transfer regulations, as amended May 3, 1950, required a showing that notice of the filing of the application had been served upon all known water-line competitors. No form for the notice was prescribed, and applicants made the required showing. This provision has since been deleted by order of Division 3, effective January 1, 1964, and pursuant to amended section 306.6(c), in those proceedings in which no oral hearing is held, if the application is approved, prior to the effective date, a synopsis of the order of approval (composed by the Com-

[3] *Towing Rates between Points on the Ohio River,* 315 I.C.C. 583, decided February 14, 1962, in which transferee's schedules were found not shown to be just and reasonable; and *Towing Rates, Pittsburgh Towing Company,* 321 I.C.C. 366, decided November 22, 1963, in which increased bargeload towing rates, when applied in connection with exclusive use of outside towing, were found to be just and reasonable and otherwise lawful.

[4] Docket No. 34155, *Pittsburgh Towing Company* v. *Union Barge Line Corp. et al;* and Civil Action No. 63-208, *Pittsburgh Towing Company and Edmund D. Osbourne* v. *Union Barge Line Corp. et al.,* in the United States District Court for the Western District of Pennsylvania. The former, alleging conspiracy under the antitrust laws to destroy transferee, was dismissed by the Commission, Chairman Walrath, by order dated March 11, 1963, at the request of transferee-complainant. The latter, alleging similar antitrust violations, was dismissed by the court January 21, 1964, for the reason that the allegations should be determined initially by the Commission under the primary jurisdiction doctrine.

mentioned suit.

mission) is published in the Federal Register.[5] Section 306.6(b) has further been amended to require applicants to serve copies of the applications on the Governors of the States in which any port or point served by the transferor is located, rather than to supply copies to the Commission to make such service.

Zubik, who neither reads nor writes, except his name, relies on assistants, particularly his young daughter, to read to him. The language of the notice was chosen by him from several drafts prepared and read to him by Osbourne, as follows:

> This is to notify you that for personal reasons, I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation of which I am the owner, Pittsburgh Towing Company.

Based on the application and additional facts disclosed at the hearing, the notice might have read somewhat as follows (it is not intended to imply that such a detailed notice was required):

> This is to notify you that for personal reasons, I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a new corporation, Pittsburgh

[5] If the regulations, as amended, effective January 1, 1964, had been effective when the application was filed herein, in lieu of the notice described below, a synopsis of the authority granted would have been published in the Federal Register substantially as follows: By order of September 9, 1960, Division 4 approved the transfer to Pittsburgh Towing Company, Pittsburgh, Pa., of the operating rights in Certificate No. W-364, issued January 18, 1943, to Charles Zubik, also of Pittsburgh, authorizing operation as a common carrier by towing vessels, in interstate or foreign commerce, in the performance of general towage between ports and points on the Ohio, Youghiogheny, Allegheny, Monongahela, and Kanawha Rivers. Applicants' attorney: Ernie Adamson, Box 62, Middleburg, Va.

Towing Company, organized for the purpose of acquiring and operating the certificate, which will issue to me the first 2,500 shares of its authorized capital stock of 5,000 shares, as compensation for the certificate.

The new corporation, which will not become a carrier until this transfer is approved, will be managed by Edmund D. Osbourne, who does not have any interest, control or affiliation with any other carrier subject to the jurisdiction of the Commission. He hold's a master's certificate and is experienced in transportation of property by water for hire. He has discussed this matter with the Commission's staff, and he is better qualified than I to direct this operation.

I have granted him an option to purchase my shares after approval of the transfer for $100,000 payable $10,000 in cash following exercise of the option, prior to December 31, 1960, and the balance in seven equal consecutive annual installments.

The corporation does not own or lease any vessels or other transportation facilities at this time. However, it proposes to acquire by lease, charter or purchase several modern towing power units, a major portion of the necessary funds for which is proposed to be obtained from the sale of part or all of the other authorized but unissued stock.

Osbourne purchased Zubik's stock in transferee on December 31, 1960. Interveners' position is that the intended Osbourne ownership of transferee raised questions of fitness and ability and of public interest not raised by Zubik ownership, and that had they been notified that, after the transfer, transferee would be Osbourne-owned, they could have successfully opposed the application, not that an Osbourne-owned transferee could do anything that a Zubik-owned (and Osbourne managed) transferee could not have done, or that an Osbourne-owned reactivation of the rights would affect, or has affected, their operations competitively, if at all, any differently from an Osbourne-managed Zubik reactivation. The essential futility of interveners' position will be considered later. Intervenors

position assumes that they were entitled, as of right, to notice of Osbourne's intentions, and that, if they had timely filed a protest, they would have been entitled to an oral hearing. Neither assumption is correct. They are based on a misconception of the nature of transfer proceedings not subject to section 5.

The failure of the order of September 13, 1961, reopening the proceeding, to describe the purpose of the further consideration and hearing doubtless gave rise to some misunderstanding. It seems apparent that the primary purpose was to determine whether approval had been obtained through misrepresentation or other fault of transferee or Osbourne and should be set aside.

The circumstances of this particular transfer may better be appreciated in the light of certain policy matters involved in transfers of operating rights not subject to section 5, with particular reference to transfers of water-carrier certificates. Many such transfers, and many more similar transfers of motor-carrier operating rights under section 212(b), and of freight-forwarder authority under section 410(g), and rules and regulations prescribed under each section (see 49 CFR 179 (motor carriers) and 49 CFR 415 (freight forwarders)), have been approved, but few decisions by the Commission or the courts dealing therewith have been printed. It may be well, therefore, to examine some of the attendant procedures and practices, and the interests which carriers other than the immediate parties to such transfers may have therein.

*The nature and limitations of transfer proceedings.* When part III of the act was enacted in the Transportation Act of 1940, and section 5(13) was amended to include water carriers subject to that part, Congress provided in section 312 for the transfer of water-carrier certificates, under regulations to be prescribed, in transactions not subject to section 5, as follows:

> Except as provided in this part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

The language of section 312 is similar to that used in section 212(b) of the Motor Carrier Act, 1935, and its intent was doubtless similar, namely, to facilitate transfers not subject to section 5. Section 312 does contain the words "for the protection of the public interest," not contained in section 212(b), but these words would appear to amount to the expression of the same Congressional intent implied under section 212(b), "that operating rights might be freely transferred so long as the public interest was not harmed thereby." See *Stearn* v. *United States*, 87 F. Supp. 596, 601 (1949).

Since the statutory language is essentially similar, the transfer regulations under section 312 are similar to those under section 212(b).[6] Each requires that applicants make specified showings, principally that transferee is fit, willing, and able properly to perform the service authorized by the certificate sought to be transferred and to conform to the requirements of the act and the Commission's regulations.

In acting on transfers not subject to section 5, the Commission depends mainly on information and evidence submitted by applicants. Rule 1.40 of the General Rules of Practice requires protests against applications to be filed promptly and as here pertinent permits the disposition of applications to be made without regard thereto. Transfers are not required to be determined on a record after opportunity for hearing. Under the prescribed regulations, the Commission determines whether or not a hearing is necessary. Hearings are rarely assigned.

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[6] Rules and Regulations Governing Transfers of Rights to Operate as a Motor Carrier in Interstate or Foreign Commerce (49 CFR 179).

In Civil No. 2431, *Brooks Transportation Co., Inc., et al.* v. *United States,* decided May 13, 1957, where the United States District Court for the Eastern District of Virginia was considering whether competing carriers were entitled to any notice, hearings, or other procedural steps, as of right, under section 212(b), the court said:

> [T]he Congress evidently thought the public concern to be too slight to demand the close scrutiny of a full-dress inquiry. For these cases an ex parte application, under the supervision of the Commission, was deemed adequate. This construction of the Act is underpinned by its legislative history and is confirmed by the practice of the Commission for more than a score of years. * * * [P]rior notice of, and participation in, the small transfer proceeding need be accorded only to the immediate parties. If other persons are not entitled to take part originally, they would not logically be entitled, as of right, to subsequent participation and stay.

All transfers under section 312 and most transfers under section 212(b), are made to new, non-carrier entities. The transferee acquires only such rights as the transferor possessed. A heavy case load of proceedings under other sections, having a greater impact on the public interest than such transfers, and a need to make reasonably quick determinations, imposes practical restrictions on the time, resources, and staff which can be devoted to individual applications. Unnecessary duplication of effort must be avoided, and discretion to reopen such proceedings and assign hearings must be used sparingly. Bureau participation must necessarily be limited to those which present serious questions of fitness of the new entities. If competing carriers are permitted to intervene, the doctrine that they are admitted to the proceeding as it stands, and in respect of the pending issues, but are not permitted to enlarge those issues or compel an alteration of the nature of the proceeding, applies. *Vinson* v. *Washington Gas Light Co.,* 321 U.S. 489.

*Section 5 standards and burden of proof are inapplicable.* Section 5 is principally concerned with the bringing under control or management in a common interest of two or more carriers, and a showing that the proposed transaction "will be consistent with the public interest" is required.

When a proceeding determined under section 5 was before the court in *Virginia Stage Lines, Inc.* v. *United States,* 48 F. Supp. 79 (1942), it said, "It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than section 5." But in *Stearn* v. *United States, supra,* where the court was considering an order entered pursuant to section 212(b) and the rules and regulations prescribed thereunder, it declared:

> But where Congress has entrusted an administrative agency to carry out the purposes of a statute under rules and regulations prescribed by the agency, there is a necessary implication that such rules and regulations must be consistent with the purposes of the statute and reasonably adopted to carry out those purposes; that they must not be contrary to or go beyond the Congressional intent. The broad language "such rules and regulations as the Commission may prescribe" is not an authorization to adopt any rule the Commission may fancy.

In dealing with the same section, the Supreme Court stated in *United States* v. *Resler,* 313 U.S. 57 (1941), "Undoubtedly the power to prescribe regulations is not unlimited."

In *Atwood's Transport Line—Lease—John A. Clarke,* 52 M.C.C. 97 (1950), referred to with approval in *County of Marin* v. *United States,* 356 U.S. 412 (1958), it was concluded:

> [I]n our opinion, the Commission may not, through its power to prescribe rules and regulations under section 212(b), in effect, legislate the provisions of section 5 into those transfer rules. It is for the Congress to enact legislation, and it has seen fit to draw a definite

> line of distinction between transfers of certificates not involved in a transaction which is subject to section 5, and the control of two or more motor carriers * * * subject to section 5, where the transfer of a certificate may be involved.

Whether a transfer of rights would have been denied had it been a transaction subject to section 5 is irrelevent in a transfer proceeding. Approval or disapproval of a transfer depends solely upon conformance or nonconformance with the transfer rules and regulations. See *Wooton—Purchase—Columbia Truck Exp.*, 49 M.C.C. 586 (1949).

*Transfer of dormant rights.* In the case of abandoned or suspended water-carrier operations, section 306.9 of the transfer regulations, contained in the order of August 4, 1943, by Division 4, requires—

> a showng that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water-carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest.

The order of August 4, 1943, includes certain provisions applicable to transfers effected in section 5 proceedings, others specifically applicable only to transfers not subject to section 5, dual provisions, and others about which there has been considerable question, particularly the above-quoted section 306.9. Although undoubtedly the rule was initially intended to require an additional showing, or perhaps an alternative[7] showing to one that the suspension

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[7] Where operations by transferee are shown to be consistent with the public interest, the reason the transferor discontinued operations should not be material. The rule seems to demand more than is required by the statute in connection with a transaction under section 5.

of operations was caused by circumstances over which the transferor had no control, whether the intention was to require the same showing in both proceedings is not clear. If such was the intention, the effect has been modified by subsequent decisions that the rule has no substantive application under section 5. See *Pan-Atlantic S.S. Corp. —Purchase—Agwilines, Inc.,* 85 M.C.C. 485, 489. Also, decisions interpreting the motor-carrier transfer rules have cast doubt on our power to require such showing in transfers not subject to section 5.

The provisions of section 306.9 were derived from a *former* motor-carrier transfer rule (1938 edition), under section 212(b), which required—

> a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control, or that the motor carrier operations authorized under the operating rights sought to be transferred are required in the public interest.

The motor-carrier rule was revoked, effective December 1, 1943. After several years, a new motor-carrier rule was prescribed, effective October 30, 1950, which provided for the transfer of dormant operating rights—

> only upon a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control.

Under that rule, in Civil Action No. 5885, *Gay* v. *United States,* decided May 16, 1955, the United States District Court for the Western District of Oklahoma held that the Commission could not deny an application where the lack of operations was caused solely by lack of demand for the services of transferor.

The motor-carrier rule has been further revised, as section 179.5(b), effective November 1, 1960, and now reads as follows:

> The mere cessation of operations by the holder of an operating right shall not be deemed to require denial of the proposed transfer of such right. If, however, a cessation of operations has occurred, which fact shall be stated in the application, and operations have not been conducted under the considered rights for a substantial period of time, the proposed transfer will be denied unless the holder shows that such discontinuance was caused by circumstances over which he had no control. The Commission may require, in an appropriate case, proof of the nature and extent of operations conducted under the operating rights for a period of 6 months preceding the date of the request for such evidence.

Part III does not provide revocation authority and procedures such as are found in part II and part IV of the act. In *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), the Supreme Court indicated that we are without authority to revoke water carrier certificates or permits in whole or in part, once they have become effective and the time fixed for requesting rehearing or reconsideration has passed. We have recommended to the Congress for 18 years that provisions for revocation for nonuse be added to part III. Bills to implement the recommendation have been introduced, but no such measures have been enacted.

There are a number of water-carrier certificates and permits outstanding which are not being used, and some have been dormant for more than 20 years. In our 61st Annual Report to Congress, dated November 1, 1947, first recommending inclusion of authority to revoke water carrier operating rights for nonuse, we stated:

> *Probably in many such instances the nonuse is not willful but due to conditions which may reasonably be regarded as beyond the control of the holders.* Changes in economic conditions since the beginning of the war have materially affected the operations of many water carriers and their ability to provide service. How long these conditions may continue cannot be forseen. * * *

> *We believe that water carriers should have reasonable protection against loss of their operating rights where abnormal or special conditions have hindered resumption or continuance of operations.* However, we do not believe it to be in the public interest that certificates and permits be wholly beyond administrative scrutiny and control. Accordingly, consideration should be given to the desirability of amending part III of the act by adding thereto revocation provisions similar in substance to those in section 212(a) of part II and section 410(f) of part IV. [Emphasis supplied.]

Operations under dormant rights may be revived by the holder at any time. Where the holder is a corporation, its stock can be (and has been in some instances) sold to new interests. Where the new interests are not a carrier or a person affiliated with a carrier, there is nothing the Commisison can do with respect to such revival. Because no showing can be required of such interests to revive the operations of corporate holders, any showing of public need the Commission might require to revive other operations could be unreasonable and unjust to noncorporate holders. Moreover, as the latter may incorporate, one way or another, in any situation not subject to section 5, the stock can be sold and any such requirement circumvented.

Many transfers are, as stated by the Supreme Court in *County of Marin* v. *United States, supra,* "little more than a paper transaction," and do not justify regulation substantially as if the transaction were subject to section 5. Even if we look beyond the transfer to a proposed change in the control of transferee not subject to section 5, our jurisdiction extends only to the transfer and determination of whether the *transferee* is fit, willing, and able properly to perform the service authorized by the certificate sought to be transferred and to conform to the requirements of the act and the Commission's regulations.

As seen, unlike the motor-carrier rule, the water-carrier rule has not been formally revised. The revision appears

overdue and will be undertaken in an appropriate proceeding.

*The prior report.* Turning now to this transfer, Division 3 stated that it was applying the following standards in determining whether the transfer should be set aside (317 I.C.C. at 666):

> Our reopening the proceeding for hearing and further consideration did not mean that we would determine the application *de novo,* disregarding the fact that no one seasonably opposed the transfer, that no showing of a need for the operations was required prior to approval, that the transfer had been approved and consummated in accordance with the terms of the order of September 9, 1960, that operations were being conducted pursuant to such approval, and that third persons have relied thereon in dealings with transferee. In the circumstances, to set aside the order will require clear and convincing evidence that approval of the transfer was induced by willfully misleading evidence in regard to a vital matter.

The above qoutation must be read in conjunction with the following from page 668:

> If the order approving the transfer was properly entered, and the conditions for issuance of the certificate in the name of transferee were fully complied with, the certificate became vested in transferee, and the Commission is without power to revoke any water carrier certificate.

The Division at that point was referring to interveners' contentions concerning transferee's operating practices, occurring after the transfer. The refusal by the Division to determine the case *de novo* related principally to issues raised by those contentions.

The most important part of the inquiry is stated in the paragraph following the above quotation from page 666—whether the actual plan would have warranted denial:

> The first question to be resolved is whether applicants purposely presented a plan of transfer and operation such as to warrant approval and thereafter proceeded with acts so inconsistent with the announced plan that, if originally stated, they would have warranted denial of the transfer. We cannot find that they did.

The emphasis is not on whether misrepresentation was willful, but whether the intended actions, if fully disclosed, would have been disapproved. Whether a misrepresentation or nondisclosure was willful would, of course, reflect upon the character or fitness of the applicants and would therefore be material. The Division found no misrepresentation as to the nature of the proposed transfer or as to transferee's fitness. Division 4 had known, as competing carriers also should have known, that after the stock was issued, Zubik could sell the stock. Division 3 recognized applicants' lack of candor in regard to Osbourne's intentions to acquire control of transferee but found, in effect, that it did not affect a "vital" matter. "Vital," not "material," is the correct word in the context. It connotes something that is not only material to the application but also material to the issues in the reopened case; in other words, a matter which, if fully disclosed in the application, would have caused Division 4 to deny the transfer.

The facts in *Abco Moving & Storage Co., Inc.—Purchase —Dierking,* 47 M.C.C. 557, on which interveners rely, are distinguishable from those here present, and that decision is not a precedent for vacating and setting aside the order.[8]

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[8] That proceeding was initiated prior to the Administrative Procedure Act, and accordingly was not governed by the second sentence of section 9(b), which reads: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.

The undisclosed real party in interest in that case had been the subject of numerous complaints in the conduct of another transportation business; moreover, on rehearing and a showing that his conduct had improved, that transfer was approved. See 52 M.C.C. 131. Contrary to the situation there, Osbourne's qualifications and participation in the management of transferee were presented in the application. In fact he was more "fit, willing, and able properly to perform the service authorized by the operating rights sought to be transferred" than was Zubik. Nondisclosure, much as it is to be deplored, is tempered by the nature of the facts not disclosed and an apparent absence of bad faith.

*Transferee's financial condition.* As of February 28, 1962, transferee showed a deficit in its capital stock and surplus account of $50,711, and its current liabilities exceeded current assets by approximately $6,895. Its income statement for a period of 5 months beginning October 1, 1961, showed operating revenues of $206,015 and deficit of $18,577. However, after eliminating expenses of $31,754 which accrued in the previous year, and deducting income of $5,000, which was incorrectly included in its income statement, transferee actually had a net income of $8,177 for said 5-months period. As previously indicated, it had then been in operation a total of less than 16 months.

In its reply to interveners' petition for reconsideration, transferee offered to demonstrate its improved financial condition as of May 31, 1963, profitable 1963 operations, and plans to build a modern automated tow boat upon favorable terminaton of this litigation. Upon motion by interveners, by the order of December 19, 1963, the material not of record was stricken.

*Transferee's method of operation.* This was described in the prior report as follows:

> Transferee advertises its general towage services in trade publications and maintains day-to-day contact

with tug owners. It issues bills of lading, which describe the shipper's barges and usually also the cargo, but it does not undertake to furnish a specific tug. Upon notice that a shipper's barges will be ready for movement, it arranges for appropriate service. While the shipper's barges are in tow, it obtains position reports by radio from the tug owner or master. It maintains hull insurance and protection and indemnity coverage against collision and other possibilities of liability. When an outside tower is hired, compensation is in miles per cargo ton-mile, with empty movements in cents per empty barge-mile, in accordance with the custom of the trade. Prior to April 1961 transferee relied exclusively on purchased towage. From that date to the hearing, it chartered a total of 8 tugboats, of which from 1 to 3 were effective at one time, the last of which was the *Charles Zubik*. Six of the vessels were chartered orally or on invoice on a per diem or monthly basis. Others were in writing. The vessel owners or masters employed the crews and paid operating and maintenance expenses.

Interveners' arguments were set forth as follows:

Interveners argue, and the examiner concluded, that transferee had no water carrier operations to which the towage service performed for it by others was incidental; that without such operations, the use of outside towing is illegal; that such use is justified only in an emergency, or occasionally, and incidental to an actual bona fide transportation operation; and that Osbourne's persistent and continuous "misinterpretation" of section 303(f)(2) as leaving the matter of ownership or operation of towing vessels to economic considerations raises serious questions as to transferee's fitness. Applicants submit that interveners' interpretation is erroneous, but nevertheless transferee's hiring of outside towage during the first several months of operation met emergency conditions, referring particularly to problems involved in organizing, financing, equipping, and reactivating the operation.

After pointing out again that the issue here is whether the order of September 9, 1960, was properly entered, the Division stated that this was not a proper proceeding to determine whether exclusive reliance on outside towage is unlawful, and that, indeed, if it were found to be, only an order to compel compliance, not a revocation of operating authority, would issue. Apropos of transferee's fitness, the Division stated:

> We are not here required to decide whether, if transferee had proposed to pursue the described method of operation indefinitely and exclusively, the transfer would not have been approved. Suffice to say that t did not and does not propose to so operate. When the transfer was approved, transferee was a new corporation. It was controlled and managed by personnel well qualified and experienced in water transportation. It proposed to acquire, as soon as possible, necessary towing power units and other equipment, and in this connection, to issue additional stock. We are unable to state at this date that it would not have performed as proposed had interveners not sought to set aside the transfer. While the series of pleadings described in the examiner's report were under consideration, and since the proceeding was reopened, it would have been imprudent to make a further offering of transferee's stock, to contract for the purchase or construction of a towboat, or even to enter into long-term charters.

In their petition for reconsideration, interveners contend that refusal to rule that transferee's "exclusive" reliance on outside towage is unlawful is arbitrary, inconsistent with the order reopening the proceeding, violates due process requirements of adequate notice, constitutes agency action unlawfully withheld, deprives them of their right to review by the court, and is erroneous. Their arguments in support of their position that exclusive reliance on outside towage is unlawful do not differ materially from those previously made. They have little relevancy to the facts and issues in this case. However, if, as interveners suggest, exclusive reliance on outside towage constitutes

brokerage service rather than common carriage, no broker's license is required under part III, and as indicated, it is not illegal not to use a water carrier certificate as a common carrier.

Interveners contend that, regardless of the motives and purpose in reopening this proceeding, and regardless of whether there was any misrepresentation, we could exercise a continuing control and jurisdiction over transferee, its fitness, and method of operation under the authority transferred under section 312 until an appropriate certificate superseding the certificate transferred is issued. Such action would doubtless make the acquisition of vessels and the making of necessary financial arrangements more difficult and might result in more onerous terms to transferee. The conditions, if any, upon which a certificate shall be issued to a transferee ordinarily should be stated in the order approving a transfer, as in any other order authorizing the issuance of a certificate.

Orders approving transfers under section 312 and the transfer regulations are subject to section 315 of the act and section 9(b) of the Administrative Procedure Act. Section 315(d), as it applies to such orders, provides that orders which have become effective shall continue in force in accordance with the terms thereof, unless suspended, modified or set aside. Section 315(c) authorizes the suspension, modification, or setting aside of orders by the Commission "upon such notice and in such manner as it shall deem proper." Section 9(b) of the Administrative Procedure Act, as it applies to such orders, prohibits suspension or revocation, "[e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise," before transferee has been notified of the facts or conduct which may warrant such action and been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Thus, it is clear that, if this were some such precertificate investigation of transferee's

financial fitness or operating practices, as interveners suggest, we would not be justified in setting aside approval of the transfer without affording transferee an opportunity to achieve and demonstrate compliance, unless its conduct was willful or its operations were an imminent hazard on the waterways. There is no evidence of the latter, and even if its conduct were willful in point of law, summary withdrawal of approval and reversion of the operating rights to the transferor would not necessarily be the proper course of action. Even under part II, where we may revoke a certificate after hearing and investigation, we may do so only for willful failure to comply, and then only if the holder willfully fails to comply within a reasonable time, not less than 30 days, fixed by us, with a lawful order commanding obedience. Compare *Ace Lines, Inc., Suspension or Revocation of Certificates,* 76 M.C.C. 667.

*Discussion and Conclusions.* As indicated, there is considerable futility in interveners' position, and, indeed, in any regulations relating to dormant rights, and there will continue to be until Congress sees fit to write part III revocation power into the law. If Division 4 had withheld approval, or if we were to set aside the order of September 9, 1960, the certificate in question would revert to Zubik and could not be revoked. Operations thereunder have been revived and could be continued under Osbourne's management, or again transferred under section 312. There would be no reason why Osbourne, as manager, would file rates different from those filed by Osbourne, as managing director. The rates, which interveners have protested, have been found, in *Towing Rates, Pittsburgh Towing Company, supra,* to be just and reasonable and otherwise lawful, when applied in connection with exclusive use of outside towage.

If exclusive reliance on outside towage were determined to be unlawful or not common carriage, a contrary position could not be deemed completely unreasonable, in bad faith,

and no finding of unfitness based on such a method of operation would be warranted. We could not, in the absence of revocation or suspension power under part III, enforce a requirement that transferee, or Zubik, or others employing the same method of operation, perform common carrier service. Compare *Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327, 49 M.C.C. 111.

Under the transfer regulations in effect when Division 4 approved the transfer, there was no valid reason for withholding approval of the transfer. Transferor's suspension of operations was properly regarded as caused by circumstances over which he had no control. If the proposals described in the application were carried out, transferee would be fit, willing, and able to perform the general towage service authorized by the certificate and to conform to the requirements of the act and the Commission's rules and regulations thereunder.

Interveners were not entitled, as of right, to notice of Osbourne's intentions to acquire Zubik's stock in transferee. The statute does not require any notice to competing carriers and opportunity to be heard in regard to any transaction not subject to section 5. Neither the transfer of the certificate to transferee nor Osbourne's acquistion of control of transferee through purchase of its stock was a transaction subject to section 5.

The evidence does not show that transferee's operations have had any material adverse effect on interveners, the smallest of which has annual gross freight revenues 16 times as great as transferee's.

The option agreement between Osbourne and Zubik should have been filed with the application under section 306.4(b) of the transfer regulations, but the omission, rectified at the hearing, does not require that the order of September 9, 1960, be set aside. Disclosure of the option

would not have required a hearing or disapproval of the transfer.

We need not and we do not decide whether transferee is operating as a common carrier when it relies exclusively on outside towage. We decide only that transferee's method of operation does not warrant a finding of unfitness, and transfer of a certificate to an unfit transferee was not authorized. Even if transferee's financial ability to continue operations were doubtful, and we do not believe that it is, we would not be justified in setting aside the transfer forthwith. We agree with the conclusions in the prior report that postponement of performance on transferee's proposals to obtain additional capital and acquire by lease, charter, or purchase, suitable vessels and other facilities has been a product of the uncertainties attendant on this proceeding. As indicated, notwithstanding our action, a certificate cannot be issued to transferee because of the stipulation entered in the suit to review the orders of April 9, 1963, and December 19, 1963, by Division 3. In the circumstances, we believe the proper course is to accord transferee an opportunity, following termination of the current controversies, to demonstrate that suitable vessels and adequate financing have been acquired. An appropriate order will be entered, which will remain in effect for a period of 1 year after termination of the court proceeding, during which period transferee may submit appropriate certification that such vessels and financing have been acquired, whereupon an appropriate certificate superseding the certificate transferred shall be issued.

*Findings.* Upon reconsideration, we find that the transfer to Pittsburgh Towing Company of the certificate issued in No. W-364 to Charles Zubik on January 18, 1943, was properly approved; that the order of September 9, 1960, by Division 4, should be affirmed; and that upon termination of the suit to review the orders of April 9, 1963, and December 19, 1963, by Division 3, and upon certification

to the Commission that suitable vessels and adequate financing have been acquired to perform the water carrier service authorized, an appropriate certificate superseding the certificate transferred shall be issued.

An appropriate order will be entered.

VICE CHAIRMAN BUSH concurs in the result.

COMMISSIONER MURPHY, dissenting:

For the reasons indicated in my dissenting expression to the prior report, I am constrained to dissent herein since the same conclusions are reached via the same line of reasoning. In addition, however, I wish to point out that the instant report puts in question the ultimate usefulness of the rules and regulations prescribed by the Commission. Section 306.4(b) of our Transfer Rules requires, among other things, that applications for transfer produce "copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer." The order of September 9, 1960, approving the transfer to transferee was based on misrepresentations and without essential information, which was withheld from the application. It matters not whether Division 4, when it issued the order of September 9, 1960, would have denied the same if all the material facts had been disclosed to it. What does matter is that Zubik and Osbourne had entered into a contract for sale of transferee stock prior to the filing of the application and failed to disclose the existence of such a contract in the application. In *Communications Comm'n.* v. *WOKO,* 329 U.S. 223, the Supreme Court held that denial of a license by the Commission was justified even though the Commission failed to find that the concealment was of material facts or had influenced the Commisison in making any decision or that it would have acted differently had it known the true facts.

If we are to expect future applicants for transfer of operating authority, or for that matter anyone who files pleadings before the Commission, to respect and abide by our rules and regulations, we should not give lip service to these rules and regulations as is being done herein.

I must also comment on the finding in the report that there is considerable futility in any regulations relating to dormant rights and that there will continue to be until Congress sees fit to write Part III revocation power into the law. Section 312 requires the Commssion in passing on transfers of certificates or permits to prescribe regulations which will provide "protection of the public interest." The position taken by the majority is a denial of its responsibility to protect, in the public interest, existing and continuing water carrier operations. The economic impact of the reactivation of dormant water carrier operating rights upon existing water carriers is a serious problem. Simply because Congress has not seen fit to confer upon the Commission the ultimate power of revocation is not sufficient reason for the Commission to abdicate its effective power under the transfer provisions of the act. Intervening certificated carriers have substantial investments in floating equipment and other property, and have floating equipment, both towboats and barges, in excess of the requirements of the traffic now available or anticipated in the foreseeable future. In additions, there are 10 other common carriers presently holding certificates to perform towage service on all or a portion of the Ohio River. Contrary to the statement in the report that transferee's operations have not had any material adverse effect on interveners, the record shows that all three interveners experienced a decline in traffic on the Ohio River and in their gross revenues in 1961, which they attribute to the competition of transferee during its first year of operation. Although we do not have the power to revoke a dormant water carrier certificate, we certainly should make an attempt where we do have the power to protect

the common carrier operations of other lines in the area which have been continuous and have provided all the transportation required by the shippers. The effect of the institution of operations under rights which have not been exercised over a long period of time is practically the same as would result from an authorization of a new service in competition with existing carriers. Operations under the certificate in question had been suspended for 16 years and no valid reasons, as required by our transfer regulations, were presented to show that it was due to circumstances over which the holder had no control. A mere desire on the part of a prospetcive purchaser of bare operating rights, with no equipment, to engage in what in effect amounts to a new service, unsupported by a scintilla of evidence of a need therefor, does not warrant approval of an application that flouts our regulations and will allow the institution of operations which will promote unsound economic conditions among the carriers in the area.

COMMISSIONER BROWN, dissenting:

I disagree with the majority and in my opinion we should not approve the transfer of this water carrier certificate. At the time of the issuance of the Division 4 order on September 9, 1960, approving the transfer, the record failed to contain any evidence, financial or otherwise, that would show the transferee able to conduct the water carrier service authorized under the certificate sought to be transferred. Likewise, the record disclosed that the operations had been dormant for over 10 years.

The order of Division 3, of September 13, 1961, reopened the proceeding for further consideration and assigned the matter for hearing, without any limitation. I therefore believe that it is incumbent upon us to consider this matter *de novo*. There is no question that the Commission has a right to reopen a proceeding where, as here, there has been a nondisclosure of the officers and directors of the trans-

feree. Compare *Abco Moving & Storage Co., Inc.—Purchase—Dierking,* 47 M.C.C. 557.

The two main issues presented here are (1) whether the transfer would be approved in view of the dormancy problem presented, and (2) whether the transferee has shown that it is fit and able to perform the service authorized by the operating rights sought to be transferred. With regard to dormancy, where there has been a cessation of operations over a substantial period of time, as here, the rule is that a transfer such as this will not be approved unless the holder of the rights shows that the cessation or suspension of operations was caused by circumstances over which the holder had no control. In this case the holder of the operating rights, Charles Zubik, clearly failed to show that the cessation of operatioins was beyond his control. Division 3 in the prior report, 317 I.C.C. 661 at page 662, appears to have attempted to close this evidential gap by taking official notice of economic conditions in the late 1940's and their effect on the water carrier industry in general. However, the fact is that Zubick's competitors maintained equipment and conducted substantial operations throughout this same period and up to the present time. It, therefore, appears that official notice was taken of nonexistent conditions. Additionally, Zubik had the burden of proving this point and, based upon the evidence of record, it is apparent that he failed in this regard.

As to the fitness of the transferee, it has no equipment and from its financial statement it appears to be insolvent. No equity capital has been invested in the company and it has no real estate or other fixed assets. In the circumstances, it is my belief that transferee has failed to show that it is fit and able to provide the service in question. Accordingly, I would deny the transfer.

COMMISSIONERS FREAS and GOFF dissent.

## ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 19th day of March, A. D. 1965.

Finance Docket No. 21193

PITTSBURGH TOWING COMPANY—CERTIFICATE TRANSFER—CHARLES ZUBIK

*It appearing,* That on September 9, 1960, the Commission, Division 4, entered its order in the above-entitled proceeding, approving the transfer under section 312 of the Interstate Commerce Act;

*It further appearing,* That upon hearing and further consideration, the Commission, Division 3, made and filed its report, 317 I.C.C. 661, and order of April 9, 1963, affirming the order approving the transfer;

*It further appearing,* That by order of December 19, 1963, the Commission, Division 3, acting as an Appellate Division, denied a petition for reconsideration;

*It further appearing,* That on January 8, 1964, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Company* v. *United States,* to review the last two of the above-mentioned orders, the United States District Court for the Eastern District of Missouri, Eastern Division, temporarily enjoined issuance of a certificate superseding the certificate transferred;

*It further appearing,* That by order of February 18, 1964, the above-entitled proceeding was reopened for reconsideration on the present record and for amplification of policy matters involved regarding the transfer of water carrier certificates;

*It further appearing,* That a stipulation was lodged with the court that the certificate will not be issued until the further order of the court;

*And it further appearing,* That reconsideration of the matters and things involved has been given and the Commission on the date hereof has made and filed its report on reconsideration herein, containing its findings of fact and conclusions thereon, which report and the said report of April 9, 1963, are hereby referred to and made a part hereof:

*It is ordered,* That transferee's petition to vacate and set aside the order of February 18, 1964, be, and it is hereby, denied;

*It is further ordered,* That the order of September 9, 1960, approving the transfer to Pittsburgh Towing Company of the certificate issued in No. W-364 to Charles Zubik on January 18, 1943, be, and it is hereby, affirmed; and that the said order shall remain in full force and effect;

*It is further ordered,* That upon termination of the above-mentioned court proceeding and upon certification to the Commission that suitable vessels and adequate financing have been acquired to perform the authorized water-carrier service, a certificate be issued to transferee superseding the certificate transferred;

*It is further ordered,* That unless compliance is made by transferee with the condition described in the next preceding paragraph herein, within 1 year after termination of the court proceeding, or within such additional time as may be authorized by the Commission, the order of September 9, 1960, shall be of no further force or effect;

*And it is further ordered,* That this order shall be effective upon termination of the court proceeding.

By the Commission.

BERTHA F. ARMES,
*Acting Secretary.*

(SEAL)

A true copy:

BERTHA F. ARMES
*Acting Secretary of the Interstate Commerce Commission*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

PITTSBURGH TOWING COMPANY, *Appellant*

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL., *Appellees*

**On Appeal From the United States District Court for the Eastern District of Missouri Eastern Division**

## MOTION TO DISMISS OR AFFIRM

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## INDEX


| | Page |
|---|---|
| STATEMENT | 2 |
| ARGUMENT | 7 |
| This Appeal Should Be Dismissed Under Rule 14(2) of This Court's Rules | 7 |
| Alternatively, Appellees' Motion To Affirm Should Be Granted | 7 |
| CONCLUSION | 12 |


### TABLE OF CASES


| | |
|---|---|
| Arkansas Public Service Commission v. United States, 147 F. Supp. 454, aff'd. per curiam, 355 U.S. 4 | 11 |
| Columbia Broadcasting System v. United States, 316 U.S. 407, 417-419, 422 | 8 |
| McKay v. Wahlenmaier, 226 F. 2d 35, 43 | 8 |
| Movers Conference of America v. United States, 205 F. Supp. 82, 86 | 11 |
| Pittsburgh Towing Company, Certificate Transfer—Charles Zubik, Finance Docket 21193 | 2 |
| United States Lines Co., Certificate Transfer, 260 I.C.C. 355, 358 | 8 |
| United States v. Resler, 313 U.S. 57, 61 | 9 |
| Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 491 | 8 |


### STATUTES


| | |
|---|---|
| Interstate Commerce Act, 49 U.S.C. Sec. 912 | 3, 8 |


### MISCELLANEOUS


| | |
|---|---|
| Interstate Commerce Commission Regulations, Title 49, Part 306, C.F.R. | 3, 5, 9 |

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PAGE

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**On Appeal From the United States District Court for the Eastern District of Missouri Eastern Division**

## MOTION TO DISMISS OR AFFIRM

Pursuant to Rules 14, Paragraph 2, and 16(1)(c) of the Rules of this Court, Mississippi Valley Barge Line Company, American Commercial Lines, Inc., and Union Barge Line Corporation, protestants before the Interstate Commerce Commission and plaintiffs in the District Court, move that this appeal be dismissed, or in the alternative, that the judgment of the District Court be affirmed.

## STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S.A. 10a)[1] setting aside orders of the Interstate Commerce Commission in Finance Docket 21193, *Pittsburgh Towing Company, Certificate Transfer—Charles Zubik,* which Commission orders authorized transfer of water carrier Certificate W-364 from Charles Zubik to the Pittsburgh Towing Company.[2]

The appellant Pittsburgh Towing Company filed notice of appeal in the district court on April 15, 1966.[3] The appellant filed its Jurisdictional Statement, and this case was docketed, on July 6, 1966, more than 60 days following notice of appeal. No application for extension of time was filed, or granted, prior to the expiration of the 60-day period prescribed in the Rules of this Court. (Rule 13, Paragraph 1) Rule 34, Paragraph 2, of the Rules of this Court require the clerk to refuse to receive any such application after the expiration of the 60-day period.

Neither the United States, nor the Interstate Commerce Commission, has appealed from the decision of the district court. The appellant Pittsburgh Towing Company was a party, and the proposed transferee, in the proceedings before the Commission, and intervened

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[1] "J.S." and "J.S.A." refer to the Jurisdictional Statement and the appendix to the Jurisdictional Statement, respectively.

[2] The final order of the Commission is found at pages 41a-42a of the Jurisdictional Statement. The opinion, and judgment and decree, of the District Court are found at J.S.A. 1a-9a, and J.S.A. 10a-11a, respectively.

[3] The assertion in the Jurisdictional Statement as filed, (J.S. 2) that notice of appeal was filed on May 15, 1966, is erroneous.

as a defendant in the proceedings before the district court.

Under Section 312 of the Interstate Commerce Act, 49 U.S.C. Sec. 912,[4] water carrier certificates may be transferred "in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part."[5] The Commission's regulations, set forth in Title 49, Part 306, Code of Federal Regulations, require a detailed showing of the transferee's fitness and ability to conduct the operations authorized. The applicants are required to submit a "copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer." 49 CFR Sec. 306.4(b). Additionally, in the case of abandoned or suspended operations, a proposed transfer "will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water-carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest." 49 CFR Sec. 306.9.

This proceeding arose out of an application filed with the Commission on July 8, 1960 by Charles Zubik to approve the transfer of water carrier Certificate W-364 from himself to the Pittsburgh Towing Company. On September 9, 1960, the Commission, by Division 4, upon a finding of "good cause therefor," approved the transfer by an order based solely upon the application. This

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[4] Set forth in full at J.S. 3.

[5] "Part" refers to Part III of the Interstate Commerce Act which provides for the regulation of water carriers.

order of September 9, 1960 was affirmed by the Commission on March 19, 1965 (J.S.A. 42a), with four Commissioners dissenting.

The application, which was the sole basis for Division 4's approval of the transfer, stated that Zubik would be the holder of all stock issued and outstanding (J.S.A. 8a) and would be an officer of the corporation. (J.S.A. 4a) Zubik, in the notification sent to appellees and other competitors, stated that "for personal reasons I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation, of which I am the owner, Pittsburgh Towing Company." (J.S.A. 5a) The district court found that each of these representations was refuted by the record and that deceit was perpetrated by Zubik in his letter to his competitors. (J.S.A. 4a, 5a, 8a, 9a)

The district court further found that, prior to filing the application, Zubik had entered into option agreements with Edmund D. Osbourne whereby Osbourne was to obtain ownership of the certificate through purchase of Pittsburgh Towing's stock, following Commission approval of the Zubik-Pittsburgh Towing transfer. (J.S.A. 3a-4a) The court held: "The plan clearly was to transfer the certificate from Zubik, a sole proprietorship, to a corporation owned by Osbourne when the application was filed, and to be owned by Osbourne when the transfer was consummated." (J.S.A. 9a) After noting the violation of the Commission's regulations in applicants' nondisclosure of the option agreements (J.S.A. 6a-7a), the court concluded: "No reasonable reader of the record before the Commission and this court could come to

any conclusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission." (J.S.A. 7a) The Commission was unaware of the option agreements when it approved the transfer on July 9, 1960. (J.S.A. 5a) As the district court observed, these agreements changed the entire nature of the proceedings from a change in the *form* of ownership to a change in ownership. (J.S.A. 8a).

Additionally, the district court found a total absence of information in the application to establish the transferee's financial fitness to conduct the operations authorized by the certificate despite the requirements of the Commission's regulations. (J.S.A. 8a) The record showed that the transferee owned no towboats, no barges, and had little, if any, capital. (J.S.A. 5a)[6]

Finally, the court found a failure by applicants to make the showing required by 49 CFR Sec. 306.9, governing the transfer of dormant certificates. There was, the court concluded, a "complete void" of any showing that the resumption of operations would be in the public interest. (J.S.A. 6a) Section 306.9 further required a showing by the transferor that suspension of operations was caused by circumstances over which he had no control. (J.S.A. 6a) As both Commissioners Murphy and Brown noted in their dissenting opinions, Zubik made no such showing. (J.S.A. 39a, 40a) The district court rejected the Commission's

[6] The Commission's report showed that transferee had a deficit in its capital stock and surplus account of $50,711. (J.S.A. 30a)

resort to official notice that business conditions were unfavorable for water carriers during the 1950's because the record showed that Zubik's competitors incurred no interruption of service during this period (J.S.A. 6a)[7]

In its judgment and decree, the district court permanently enjoined the Commission "from transferring water carrier certificate No. W-364 to Intervenor Pittsburgh Towing Company, as authorized by said orders." (J.S.A. 11a) The orders referred to are Division 4's order of September 9, 1960, and the affirmance of that order by Division 3 on April 9, 1963 and December 19, 1963 and by the full Commission on March 19, 1965. (J.S.A. 10a) The Memorandum Opinion of the district court required plaintiffs (appellees) to submit a decree in accordance with such opinion "on notice unless consultation among the parties shall bring about a waiver of notice." (J.S.A. 9a) Copies of plaintiffs' proposed decree were sent to the attorneys for appellant and all other parties on March 14 and 22, 1966. Changes were made therein at the request of counsel for the Interstate Commerce Commission but counsel for appellant interposed no objection to the judgment and decree as signed by the judges of the three-judge district court.

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[7] Commissioner Brown observed in her dissenting opinion: "It, therefore, appears that official notice was taken of nonexistent conditions." (J.S.A. 40a)

## ARGUMENT

### This Appeal Should Be Dismissed Under Rule 14(2) of This Court's Rules.

Rule 13(1) of the Rules of this Court provides that it shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court not more than 60 days after the filing of the notice of appeal. Applications for extension of such time must be made before the expiration of the 60-day period. (Rules 13 and 34(2)) Under Rule 34(2), the clerk of the court "will refuse to receive any application for extension sought to be presented after expiration of such period."

In this proceeding, notice of appeal was filed with the District Court, Eastern District of Missouri, Eastern Division, on April 15, 1966. Appellant filed its jurisdictional statement, and the case was docketed, on July 6, 1966, more than 60 days following the notice of appeal.

Pursuant to the provisions of Rule 14(2) of the Rules of this Court, appellees move that this Court dismiss this appeal, with such orders thereon with respect to costs as may be just.

### Alternatively, Appellees' Motion To Affirm Should Be Granted.

This appeal presents no substantial question warranting plenary consideration by this Court.

The issues raised on appeal have no general application or importance, and are restricted to an essentially factual inquiry as to whether, on a specific record, the requirements of the Commission's transfer regulations were met. (See J.S. 2-3). There is, in this proceeding, no basis for departing from the general rule that

the reviewing court's determination of whether the agency's findings are supported by substantial evidence is final. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491].

As observed by the district court, legislative regulations, created by a Federal agency pursuant to congressional authority, have the force of law, and the agency is as bound by such regulations as is the general public. *Columbia Broadcasting System* v. *U. S.,* 316 U.S. 407, 417-419, 422; *McKay* v. *Wahlenmaier,* 226 F. 2d 35, 43. The Commission's regulations governing the transfer of certificates were promulgated pursuant to Section 312 of the Interstate Commerce Act. (Set forth at J.S. 3) The Commission itself has held that transfers may be consummated only in accordance with its transfer regulations. *United States Lines Co. Certificate Transfer,* 260 I.C.C. 355 at page 358.

In a unanimous decision, the three-judge district court found that the record conclusively established a lack of compliance with the Commission's transfer regulations. When the Commission approved the transfer on September 9, 1960, it relied solely on the application which represented that Zubik would be an officer, and the holder of all outstanding and issued stock, of the transferee corporation, which representations were found by the court to be refuted by the record. Unknown to the Commission, the transfer in question was in effectuation of pre-existing, undisclosed agreements between Zubik and Osbourne whereby Osbourne was to obtain ownership of the water carrier certificate. The evidence on this point was so clear that the district court concluded:

> "No reasonable reader of the record before the Commission and this court could come to any con-

> clusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission." (J.S.A. 7a)

By presenting the transfer as a change in Zubik's form of ownership, while the transfer was instead a change in ownership, determination of the transferee's fitness and ability was circumvented. As this Court observed in connection with regulations governing the transfer of motor carrier certificates:

> "Plainly the finding of the requisite fitness, willingness, and ability of the first applicant is wholly inapplicable to his proposed transferee. . ." *United States* v. *Resler,* 313 U.S. 57, at page 61.

The Commission's order of September 9, 1960, was, therefore, based upon a complete misconception of the transaction before it, and was totally invalid.

Aside from failure to file the Zubik-Osbourne agreements, the district court found that the Commission's regulations had not been followed in other essential respects. The court found a "complete void" of any showing that resumed operations would be in the public interest, and no more than a mere assertion by Zubik that cessation of operations was caused by circumstances beyond his control, despite the provisions of 49 CFR 306.9 which clearly state that approval can be had only if such facts are established. In addition, there was in the application "a total absence of information that Pittsburgh was in any way financially fit to carry on the operations authorized by the certificate." (J.S.A. 8a) Nothing more was recited in the

application than the "intention" of the supposed owner of the transferee. (J.S.A. 8a)

In short, the district court found that Division 4's approval of the transfer was based on a misconception regarding the transaction before it, such misconception having been induced by nondisclosures and misrepresentations, with this fatal error being compounded by a total lack of information to satisfy the Commission's regulations in other vital respects.

The Appellant contends that in failing to remand the case to the Commission, the district court usurped the powers of the Commission. (J.S. 6-7) In its judgment and decree, the district court permanently enjoined the Commission from transferring the Certificate No. W-364 to Pittsburgh Towing Company, as authorized by the Commission's order of September 9, 1960, and as affirmed in its subsequent orders.[8] So far as a remand was concerned, the Commission had previously reopened the proceeding after review had been sought in the district court. (J.S.A. 1a) This produced another affirmance by the Commission of its order of September 9, 1960. (J.S.A. 42a)

In view of the district court's conclusion that no "reasonable reader"[9] before the Commission or before the court could find the purpose of the application to be other than to effectively circumvent the Commis-

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[8] This order was presented to and signed by the district court after notice to the parties. Appellant interposed no objection to the form of the order and raised its objection with respect thereto for the first time in this Court.

[9] The hearing examiner, who presided at the hearings in the proceeding before the Commission, found misrepresentation in the application and recommended disapproval of the transfer. (See J.S.A. 7a)

sion's regulations, further consideration of the application by the Commission would have been pointless. The proceeding had been pending some five and one-half years before the Commission, during which time Pittsburgh Towing had conducted operations under the invalid order of September 9, 1960.[10]

In this proceeding, there has been no usurpation of Commission powers by the district court. The district court found invalid the Commission's orders authorizing transfer of the certificate, and permanently enjoined the Commission from transferring water carrier certificate No. W-364 to Pittsburgh Towing Company, as authorized by said orders. The enforcement or effectuation of invalid orders of the Commission have been similarly enjoined in other cases. *Arkansas Public Service Commission* v. *United States,* 147 F. Supp. 454, aff'd *per curiam* 355 U.S. 4; *Movers Conference of America* v. *United States,* 205 F. Supp. 82, 86. In this proceeding, the district court found that the Commission could not reasonably find the application to be other than a circumvention of the regulations it was bound to enforce, a finding which neither the Commission nor the United States has appealed. Under the circumstances, a permanent injunction against the transfer authorized in the Commission's orders was the only appropriate and adequate remedy. No doubt remained as to any essential element of decision, and a remand would serve no useful purpose.

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[10] This order permitted the transferee to perform the water-carrier service authorized under said certificate, pending issuance of the certificate. The Commission previously refused to vacate this order on September 13, 1961 and April 9, 1963.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed, or in the alternative, that the judgment of the district court should be affirmed.

ARTHUR L. WINN, JR.
SAMUEL H. MOERMAN
J. RAYMOND CLARK
JAMES M. HENDERSON
Investment Building
Washington, D. C. 20005
*Attorneys for Appellees*

August 4, 1966.
Washington, D. C.

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## INDEX


| | Page |
|---|---|
| Statement | 1 |
| Argument | 3 |
| Cases Cited by Opposing Counsel | 5 |
| Conclusion | 6 |


## TABLE OF CASES CITED


| | |
|---|---|
| Consolo v. Maritime Commission, 383 U.S. 607 | 3 |
| FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 | 3 |
| Gilbertsville Trucking Co. v. U. S., 371 U.S. 115, 129 | 3 |
| Heavy-Specialized Carriers Conference v. U. S., 231 Fed. Supp. 968 | 4 |
| I. C. C. v. Atlantic Coast Line, 383 U.S. 576, 601 | 4 |
| Kirschbaum v. Walling, 316 U.S. 517, 523 | 4 |
| Pittsburgh Towing Co. cases: | |
| 317 I.C.C. 661 | 2 |
| 321 I.C.C. 366 | 2 |
| 324 I.C.C. 460 | 2 |

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No. 319

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MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.,
*Appellees,*

v.

UNITED STATES OF AMERICA ET AL. (Pittsburgh Towing Company), *Appellants*

---

**On Appeal From the United States District Court for the Eastern District of Missouri—Eastern Division**

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## REPLY TO MOTION TO DISMISS OR AFFIRM AND MOTION TO REVERSE

---

### STATEMENT

It is true that the docketing of this case was not timely under Rules 13 (1) and 14 (2). This delay was occasioned by a misunderstanding between Counsel for appellant, for which we humbly apologize to the Court. We shall take care that such delay will not occur again. We suggest to the Court that this delay has injured no one and does not affect the jurisdiction or merits of the case. It is in the best interest of the public that this case be considered on its merits, the motion to dismiss denied, and to reverse granted.

The Statement of facts, pages 2 through 6 of the Motion to Dismiss, is substantially correct except for the following:

(a) The jurisdictional statement was corrected and indicates that the notice of appeal was filed April 15th, 1966, and counsel was notified of this correction.

(b) The Report of the Commission contains a full statement of the case, including the fact that Pittsburgh Towing Co. at the time of filing the initial application was not a carrier subject to regulation.

(c) The Commission decided the issue in this proceeding four times in favor of Pittsburgh Towing Co., two are unreported but three are reported at:

324 I.C.C. 460 [1]
321 I.C.C. 366 [2]
317 I.C.C. 661 [3]

---

[1] Report on reconsideration.

[2] Decided Nov. 22 '63, holding inter alia; page 371, "We further find that such rates when applied in connection with exclusive use of outside towage are just and reasonable and otherwise lawful."

[3] Decided Apr. 9 '63, holding inter alia, page 667, "At the date of consummation, Zubik was faced with such personal problems that his services as an officer or director were not available to transferee. Osbourne is well qualified to manage transferee's operations. He is a graduate of the United States Merchant Marine Academy and is licensed as a master for river vessels. He has been connected with water transportation since he was a youth, was one of the founders of the Waterways Freight Bureau, and is a founder member of the American Society of Traffic and Transportation." It seems quite obvious that the Commission considered the talents of Osbourne to be an advantage to the Public Interest.

## ARGUMENT

Our first point is that, if the decision and order (App. "B") of the Commission have a rational basis, the District Court had no authority to review the discretionary action of the Commission. In a recent decision, *Consolo* v. *Federal Maritime Commission,* March 22, 1966, 383 U.S. 607, this honorable court said (even if the District Court had power to review), that if two conclusions might be drawn from the record before the agency, the orders of the agency would be sustained.

Our second point is that questions of public interest are committed exclusively to the Commission. *Gilbertsville Trucking Co.* v. *United States,* 371 U.S. 115-129. The measure of the public interest is not a reviewable question for the District Courts.

The Commission found that transferor Zubik had not filed Reports, but Zubik had eight towboats operating when this application for transfer was filed. (Page 13a App. "B" J.S.) (317 I.C.C. 662).

The Court below erred in placing too much emphasis on the letter of notice sent out by Zubik to competitors, on July 7, 1960. (J.S. 5a) The law concerning legal notice is well established to the effect that when the Commission reopened the case and set it for public hearing the form and substance of the letter of notice became moot. The Commission has since abolished such procedure and all notices are published in the Federal Register.

We also wish to direct attention to the decision of this Court in the case of *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143, in which it was held that agencies have the power to interpret and apply their own rules and the Courts are bound by them. In deal-

ing with the rules of the I.C.C. the Court applied a stronger expression in *Kirshbaum* v. *Walling,* 316 U.S. 517, 523.

We suggest that the Court below erred in failing to remand. If the District Court had power to review this discretionary action of the agency, then it should have made proper findings and remanded the case for further action consistent with such findings. Congress did not intend to empower the district courts to both review and perform the administrative duties of agencies. *I.C.C.* v. *Atlantic Coast Line,* 383 U.S. 576-601. There is grave doubt that the districts courts have power to even review matters which have been committed to the discretion of the Commission.[1]

We deem it appropriate to direct the attention of the Court to a decision by the District Court sitting in this same District of Missouri and two members of the Court were the same as in the case here on appeal, *Heavy Specialized Carriers Conference, et al.* v. *United States,* 231 Fed. Supp. 968.[2] We realize that each case

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[1] See Chapters 28 and 29, Administrative Law, by Kenneth Culp Davis.

[2] This decision, filed July 22 '64 was not appealed and it held inter alia,

"The scope of judicial review is narrow and we cannot substitute our own view for that of the ICC, if its view is supported by substantial evidence and is not arbitrary or capricious. *United States* v. *Pierce Auto Lines,* 327 U.S. 515; *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503; *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125; *Mississippi Valley Barge Co.* v. *United States,* 292 U.S. 282."

"The interpretation of a certificate issued by the ICC is properly with the ICC and not the courts. *Service Transfer Co.* v. *Virginia,* 359 U.S. 171; *Nelson, Inc.,* v. *United States,* 355 U.S. 554; *Malone Freight Lines, Inc.* v. *United States,* 107 F. Supp. 946 (N.D. Ala. 1952), aff'd 344 U.S. 925."

may be quite different in factual details but in dealing with questions of broad import that might establish an unfortunate precedent in applying our National Transportation Policy to accord with the Public Interest in the future there must be some degree of comity and for this reason the agency should have the duty and obligation of supervising such determinations.

## CASES CITED BY OPPOSING COUNSEL

Careful consideration has been given to the cases cited in support of the Motion to Dismiss and Affirm. We find no support in these cited cases for the theory that a district court may upon the basis of an unusually caustic and critical Memorandum Opinion enter a decree based solely upon the administration of one of the procedural rules of an agency and refuse to give that agency an opportunity to take further action, on remand. Indeed, we find no such supporting decisions, whether opposing Counsel has cited them or not. We contend that the Interstate Commerce Commission has, in its Report (App. "B") answered every question raised in the Court below. This agency, the Commission, is charged by Congress to protect the public interest and this includes protection for small carriers as well as large carriers.

Under the terms of the present injunctive decree, it is doubtful that Pittsburgh Towing Co., could have a further hearing before the Commission to cure a deficiency of proof. Due process of law before the agency is therefore frozen.

## CONCLUSION

It is respectfully submitted that the motion to Dismiss and Affirm is without merit and should be denied and that this motion to Reverse and Remand should be granted, with such appropriate instructions as this Honorable Court may deem wise and proper to protect the public interest and the National Transportation Policy.

ERNEST L. KEATHLEY
818 Olive Street,
St. Louis, Mo.

ERNIE ADAMSON
Box 62
Middleburg, Virginia

*Attorneys for Appellants.*

Date: August 11, 1966

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Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

PITTSBURGH TOWING COMPANY

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.

**Appeal from the United States District Court for the Eastern District of Missouri—Eastern Division**

## PETITION FOR REHEARING OF PER CURIAM DECISION AND JUDGMENT DISMISSING APPEAL

ERNEST L. KEATHLEY
818 Olive Street
St. Louis, Mo.

ERNIE ADAMSON
Box 62
Middleburg, Virginia
*Attorneys for*
*Petitioner-Appellant.*

Due December 2nd, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No. 319

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PITTSBURGH TOWING COMPANY

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.

---

**Appeal from the United States District Court for the Eastern District of Missouri—Eastern Division**

---

## PETITION FOR REHEARING

Now come Counsel for petitioner-appellant, and respectfully petition this Honorable Court to grant rehearing and reconsideration of its per curiam decision granting appellees motion to dismiss the above-entitled appeal on November 7, 1966.

1. This petition is presented in good faith and not for the purpose of delay. No prior application has been made to this Court for the relief now sought herein. Co-counsel for appellant in St. Louis, Missouri, is Ernest L. Keathley, who handled the filing of notice of appeal, application for a stay pending appeal and all other proceedings in the District Court for the Eastern District of Missouri relating to the above-entitled appeal. Annexed hereto and made a part hereof is an affidavit of co-counsel Keathley, duly verified on November 18, 1966 and marked Exhibit A. Annexed to the said affidavit are fourteen (14) sheets consisting of true copies of relevant documents and marked Exhibits A-1 thru A-6. The original affidavit will be delivered to the Clerk of Court.

2. Some confusion concerning this appeal and stay of judgment developed at the office of the Secretary of the Interstate Commerce Commission. When the opinion of the Court below was served, this Counsel made inquiry at the Commission as to the filing of a notice of appeal by the Commission, which action would have made a request for a stay in behalf of this appellant unnecessary.

3. Counsel was informed at the Commission that until judgment was entered, no conference would be appropriate. After judgment was entered Counsel requested the Secretary's office to permit inspection and publication of any official minutes of the Commission relating to this case. Such right of publication is provided for in U.S.C. Section 17(3) Title 49. The official minute clerk for the Commission (Mr. Frank Cambron) refused the request and referred Counsel to his superior, the Secretary. After some delay, Counsel contacted Secretary Garson who refused to publish or

permit inspection of the official minutes. The Commission appointed Mr. A. Neal Garson as Secretary shortly after he had appeared in the Court below in this proceeding, as appears in the transcript of record. Mr. Garson was familiar with this case.

4. This Counsel did not see any official record of action by the Commission in this proceeding until May 5th, 1966, when an order was released, dated March 18th, 1966. (See Exhibit A-5). It now appears that the Secretary presented the above-mentioned order to the Commission for adoption seven days before the judgment was entered in the Court below, and then withheld service thereof for forty-eight days while this Counsel sought information as to the status of the proceeding. Concealment by the Secretary of these official acts of the Commission was a substantial cause of delay in perfecting this appeal.

5. It also appears that on March 18th, 1966 an action was taken (see Exhibit A-6), concerning the decision not to appeal. No such order or notice was served at any time and this Counsel actually saw this extract of minutes for the first time when it appeared annexed as an exhibit to the motion to hold the Commission in contempt, June 20th, 1966. (See Exhibit A-4). On or about May 20th, 1966, Counsel Keathley was requested to apply for a stay of judgment. We could not wait longer to apply for a stay.

6. Counsel do not feel that they were negligent in perfecting and prosecuting this appeal. Rather they were caught in a web, not of their own making, but nevertheless creating a dilemma. On June 15, 1966 Mr. Keathley was still waiting for action on his motion by the Court below.

7. The dissent by Mr. Justice Black, in our opinion, is well founded in law and common sense. The administration of justice is the true objective of all laws. The questions presented in this appeal are important and substantial.

8. Attention of the Court is directed to the fact that on settlement of the stay order of the Court, dated June 24th, 1966, no objection was raised by opposing Counsel as to timeliness. We cannot say just what opposing Counsel had in mind when they agreed to the stay order. Failure to raise such objection to procedural matters, which objection could or should have been raised at that time in the Court below, in our opinion, should not be heard on appeal. Otherwise the doors to entrapment might be left wide open. If there was delay in this proceeding, it was not ours.

Counsel for petitioner-appellant respectfully pray that this Honorable Court waive the unintentional breach of its Rule 13(1), vacate its prior action, and proceed to determine and adjudicate the questions in issue on this appeal.

Respectfully submitted,

ERNEST L. KEATHLEY
818 Olive Street
St. Louis, Mo.

ERNIE ADAMSON
Box 62
Middleburg, Virginia
*Attorneys for*
*Petitioner-Appellant.*

Dated Nov. 29, 1966

**Certificate**

I, Ernie Adamson, of Counsel for Petitioner, do certify that the foregoing petition for rehearing, in Appeal No. 319, decided November 7, 1966, is filed in good faith and not for the purpose of delay.

ERNIE ADAMSON

November 29, 1966.

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**EXHIBIT A**

STATE OF MISSOURI }
CITY OF ST. LOUIS } ss

AFFIDAVIT

Ernest L. Keathley, being first duly sworn, deposes and states as follows:

That he is one of the attorneys of record in the matter of Pittsburgh Towing Company vs. Mississippi Valley Barge Line et al., being Cause No. 319 in the Supreme Court of the United States, October Term 1966.

That Notice of Appeal to the Supreme Court was filed April 15, 1966, from the Order, Judgment and Decree of the three-Judge District Court for the Eastern District of Missouri—Eastern Division.

That Motion for stay of execution of the District Court's Order, Judgment and Decree was filed in the District Court June 3, 1966; that objections were made to said Order as submitted with respect to the form and language of certain portions thereof; that because of the absence from the city on judicial business of Hon. Roy W. Harper, presiding Judge of the United States District Court for the Eastern District of Missouri, affiant was not able to obtain order directing stay of execution signed by each of the three judges until June 24, 1966;

That record on appeal was transmitted to the Clerk of the Supreme Court of the United States June 10, 1966, which record did not include the Court order of June 24, 1966, directing stay of execution pending final disposition of this case on appeal, the same being transmitted as supplemental record on June 28, 1966.

That affiant conferred on several occasions with attorneys for Plaintiffs Mississippi Valley Barge Line Company et al., Appellees herein, and also conferred on several oc-

casions with attorneys for United States of America; that said attorneys agreed in substance to the requested stay of execution, if the form and language thereof were modified in the manner that they demanded, and that said stay of execution was approved by the Interstate Commerce Commission and the United States of America, acting through the Office of the Department of Justice, with the changes requested by the Interstate Commerce Commission and which changes were incorporated in the Court order of June 24, 1966. Letter from Mrs. Betty Jo Christian, Attorney for Interstate Commerce Commission, Washington, D. C., dated June 22, 1966, addressed to Hon. Richard D. Fitz-Gibbon, Jr., United States Attorney for the Eastern District of Missouri, St. Louis, Missouri, is annexed hereto.

That on June 17, 1966, attorneys for Plaintiffs-Appellees, Mississippi Valley Barge Line Company et al., filed in the United States District Court for the Eastern District of Missouri—Eastern Division, their Motion to require Defendant Interstate Commerce Commission to show cause why it should not be cited in contempt, with notice of hearing of said Motion July 1, 1966, at ten o'clock a.m., as evidenced by copy of letter and copy of said Motion and Notice annexed hereto; that thereafter, to-wit: on June 29, 1966, said Plaintiffs-Appellees, through their attorneys of record, withdrew said Motion to require the Interstate Commerce Commission to show cause why it should not be held in contempt as per written withdrawal of Motion annexed hereto.

That failure of appellant's attorneys to apply for an enlargement of time within which to perfect and docket said appeal was occasioned through inadvertence and misunderstanding between appellant's attorneys of record as to the duties of each with respect to the matter of perfecting the appeal, and was not the result of intentional or willful neglect or refusal to comply with the applicable rules of the Supreme Court of the United States.

That this affidavit is made for the purpose of explaining and showing to the Court that said failure to comply with the Court rules was unintentional and not for the purpose of hindering, delaying or impeding final disposition of the case on its merits.

Dated at St. Louis, Missouri, November 18, 1966.

/s/ ERNEST L. KEATHLEY
Ernest L. Keathley

Subscribed and sworn to before me this 18th day of November, 1966.

/s/ JOSEPH WALL
*Notary Public*

My Commission expires:
Sept. 27, 1967

**EXHIBIT A-1**

INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20423

BJC:scl
June 22, 1966

AIR MAIL

Richard D. Fitzgibbon, Jr., Esq.
United States Attorney
Eastern District of Missouri
St. Louis, Missouri

Attention: John A. Newton, Esq.
Assistant U.S. Attorney
Re: Mississippi Valley Barge Line Co.
v. United States,
Civil Action No. 64 C 3(1),
E.D. Mo., E. Division
(G. C. File No. 1917)

Dear Mr. Fitzgibbon:

Mr. Ernest L. Keathley, counsel for Pittsburgh Towing Company, an intervening defendant in the above-styled proceeding, has requested that I inform you of the Commission's position concerning Pittsburgh Towing's motion for a stay pending appeal.

The Commission has unanimously voted not to appeal the district court's decision to the Supreme Court. I am authorized to state that the Department of Justice has also decided not to appeal the decision. However, we have no objection to a stay of the judgment pending completion of Pittsburgh Towing's appeal.

It is our understanding that the plaintiffs, Mississippi Valley Barge Line Co., et al., have requested that a condition be incorporated in any stay which may be issued to

provide that, pending appeal, no party to the proceeding shall take any action with respect to the subject matter of this proceeding other than the prosecution or defense of the appeal. The Commission has no objection to such a condition.

In our opinion, however, the form of the stay order presented by Pittsburgh Towing is not appropriate. The proposed order would provide that the judgment of the Court be "set aside, vacated, annulled and suspended, pending final disposition of this case on appeal to the Supreme Court of the United States." We suggest that a more appropriate provision would be that the judgment is "stayed pending appeal to the Supreme Court of the United States."

In addition, we note that the proposed order is drafted for the signature of a single district judge. Under Rule 62(c) of the Federal Rules of Civil Procedure, a stay pending appeal of a judgment of a three-judge district court can only be made:

> * * * (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

We would appreciate your informing the Court of our position.

Copies of this letter are being sent to all counsel of record.

Yours truly,

(Mrs.) Betty Jo Christian
*Attorney*

cc: John H. D. Wigger, Esq.
Attorney
Department of Justice
Washington, D. C.

Ernie Adamson, Esq.
Aspen Hill
Middleburg, Virginia

Ernest L. Keathley, Esq.
818 Olive Street
St. Louis, Missouri

James N. Henderson, Esq.
La Roe, Winn & Moerman
Investment Building
Washington, D. C.

Gregory W. Rebman, Esq.
Rebman, La Tourette & Gunn
Suite 1230, Boatmen's Bank Building
St. Louis, Missouri

---

**EXHIBIT A-2**

REBMAN, LA TOURETTE & GUNN
ATTORNEYS AT LAW
SUITE 1230 BOATMEN'S BANK BUILDING
ST. LOUIS, MISSOURI 63102

June 17, 1966

Mr. Harold G. Pryce, Clerk
U. S. District Court
U. S. Customs & Courthouse
St. Louis, Missouri

Re: Mississippi Valley Barge Line Co., et al.
vs. United States of America et al.
No. 64C 3(1)

Dear Mr. Pryce:

Enclosed you will find an original and three copies of the Notice in connection with my Motion filed this day to require the Interstate Commerce Commission to show

cause. I am also enclosing 3 additional copies of the said Motion for the Court files.

Yours very truly,

/s/ G. M. REBMAN
G. M. Rebman

GMR:ik
encls.
cc: Hon. Nicholas Katzenbach
Hon. Donald P. Turner
Hon. Richard D. FitzGibbon, Jr.
Hon. Robert E. Ginnane
Hon. Betty Jo Christian
Hon. Ernest L. Keathley
Hon. Ernie Adamson
Mr. James Henderson

---

**EXHIBIT A-3**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 64C 3(1)

MISSISSIPPI VALLEY BARGE LINE CO., AMERICAN COMMERCIAL LINES, INC. and UNION BARGE LINE CORPORATION,
*Plaintiffs*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

NOTICE

To: Hon. Nicholas Katzenbach, Attorney General of the United States, Department of Justice, Washington, D. C.

Hon. Donald P. Turner, Assistant Attorney General of the United States, Department of Justice, Washington, D. C.

Hon. Richard D. FitzGibbon, Jr., United States Attorney, Federal Building, 12th and Market Streets, St. Louis, Mo.

Hon. Robert E. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C.

Hon. Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington, D. C.

Hon. Ernest L. Keathley, Attorney, 748 Paul Brown Bldg., St. Louis, Missouri, 63101.

Hon. Ernie Adamson, Attorney, Aspen Hill, Middleburg, Va.

Notice is hereby given that the undersigned, attorney for Plaintiffs, will on the 1st day of July, 1966, at ten o'clock a.m. or as soon thereafter as the same can be heard, present and argue the attached motion.

/s/ G. M. REBMAN

G. M. Rebman
Rebman, LaTourette & Gunn,
1230 Boatmen's Bank Bldg.,
St. Louis 2, Missouri
GA 1-6010

**EXHIBIT A-4**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 64C 3(1)

MISSISSIPPI VALLEY BARGE LINE CO., AMERICAN COMMERCIAL LINES, INC. and UNION BARGE LINE CORPORATION,
*Plaintiffs*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

## MOTION TO REQUIRE DEFENDANT INTERSTATE COMMERCE COMMISSION TO SHOW CAUSE WHY IT SHOULD NOT BE CITED IN CONTEMPT

Come now Mississippi Valley Barge Line Co., American Commercial Lines, Inc., and Union Barge Line Corporation and move this Honorable Court to issue an order to the Interstate Commerce Commission directing it to show cause why said Interstate Commerce Commission should not be held in contempt of the order of this Court entered on the 25th day of March, 1966 in the above entitled cause, which said order is as follows:

"IT IS ORDERED, ADJUDGED AND DECREED:

1) That the Orders of the Defendant Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 are hereby set aside, annulled and suspended.

2) That the Defendant Interstate Commerce Commission is permanently enjoined from transferring water carrier certificate No. W-364 to Intervenor

Pittsburgh Towing Company, as authorized by said orders."

And for reason for this motion it is submitted that:

1. By order dated the 18th day of March, 1966, served May 5, 1966, which was after February 18, 1966, the filing and service date of the memorandum opinion of this Court, the Interstate Commerce Commission served its order which provides as follows:

> "*It is ordered,* That the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, in the above-entitled proceeding be, and they are hereby vacated and set aside;
>
> "*It is further ordered,* That the above-entitled proceeding be, and it is hereby, reopened for further consideration on the present record;
>
> "*And it is further ordered,* That this order shall be effective 75 days from the date of service."

A copy of said order of the 18th day of March, 1966 of the Interstate Commerce Commission, served May 5, 1966, is attached as Exhibit 1 to this Motion.

2. Said order would and does completely violate the order, judgment and decree of this Court entered on March 25, 1966, permanently enjoining the Interstate Commerce Commission from transferring Water Carrier Certificate No. W-364 to Pittsburgh Towing Company, in that the Interstate Commerce Commission has reopened the transfer proceeding in Finance Docket 21193 for "further consideration on the present record."

3. That while Pittsburgh Towing Company, intervenor herein, has filed its notice of appeal to the Supreme Court of the order, judgment and decree of this Court, said notice has not and does not vacate the order, judgment and decree of this Court, so as to enable the Interstate Commerce

Commission to further consider at this time pending said appeal the application matter in Finance Docket No. 21193 contrary to the order, judgment and decree of this Court.

4. The order of the Interstate Commerce Commission entered on the 18th day of March, 1966 and served on the 5th day of May was entered contrary to the action of the Commission taken on the 18th day of March, 1966 as per the attached certified copy of the minutes of a General Session of the Interstate Commerce Commission held on said date, which minutes are attached as Exhibit A hereto.

WHEREFORE movants pray this Honorable Court to issue its order directed to defendant Interstate Commerce Commission ordering and directing said defendant to show cause on or before the ... day of June, 1966, if any there be, why it should not be required to abide the order, judgment and decree of this Court entered on the 25th day of March, 1966, or be held in contempt of the aforesaid order of this Court.

JAMES M. HENDERSON
LA ROE, WINN & MOERMAN
Investment Building
Washington, D. C.

G. M. REBMAN
REBMAN, LA TOURETTE & GUNN
1230 Boatmen's Bank Bldg.,
St. Louis, Missouri 63102

*Attorneys for:*
*Mississippi Valley Barge Line Company*
*American Commercial Barge Line Company*
*and Union Barge Line Corporation*
*Plaintiffs*

**EXHIBIT A-5**

EXHIBIT 1

SERVICE DATE
MAY 5, 1966

## ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its offices in Washington, D. C., on the 18th day of March, A.D. 1966.

Finance Docket 21193

PITTSBURGH TOWING COMPANY
—CERTIFICATE TRANSFER—
CHARLES ZUBIK

*It appearing,* That on February 18, 1966, the United States District Court for the Eastern District of Missouri, Eastern Division, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Co.* v. *United States,* annulled the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, in the above-entitled proceeding, pursuant to which:

*It is ordered,* That the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, in the above-entitled proceeding be, and they are hereby, vacated and set aside;

*It is further ordered,* That the above-entitled proceeding be, and it is hereby, reopened for further consideration on the present record;

*And it is further ordered,* That this order shall be effective 75 days from the date of service.

By the Commission.

H. NEIL GARSON,
*Secretary*

(SEAL)

**EXHIBIT A-6**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of March, A.D. 1966.

Commissioners—JOHN W. BUSH, WILLIAM H. TUCKER, HOWARD G. FREAS, KENNETH H. TUGGLE, RUPERT L. MURPHY, LAURENCE K. WALRATH, ABE MCGREGOR GOFF, CHARLES A. WEBB, PAUL J. TIERNEY, VIRGINIA MAE BROWN, WILLARD DEASON.

MISSISSIPPI VALLEY BARGE LINE CO., ET AL.

v.

UNITED STATES, ET AL.

Civil Action No. 64 C 3(1), U.S.D.C., E.D. Mo.
(Finance Docket 21193)

Voted not to appeal from the decision of the United States District Court in Civil Action No. 64 C 3(1).

**EXHIBIT A-7**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 64C 3(1)

MISSISSIPPI VALLEY BARGE LINE CO., AMERICAN COMMERCIAL LINES, INC. and UNION BARGE LINE CORPORATION,
*Plaintiffs*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

## WITHDRAWAL OF MOTION

Come now Plaintiffs and withdraw their motion to require the Interstate Commerce Commission to show cause why it should not be held in contempt of the Order of this Court entered on March 25, 1966.

/s/ G. M. REBMAN
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*Attorney for*
*Mississippi Valley Barge Line Co.,*
*American Commercial Lines, Inc.*
*and Union Barge Line Corporation*
*Plaintiffs*